Supreme Court, U.S.
FILED

113 10 08-751 DEC 10 2008

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

COUNTY OF EL PASO, ET AL.,

Petitioners,

v.

MICHAEL CHERTOFF, SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY, AND
U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents

On Petition for a Writ of Certiorari to the United States District Court for the Western District of Texas

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
ELIZABETH G. OYER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

On April 3, 2008, the Secretary of Homeland Security waived the application of thirty-seven federal statutes to activities relating to construction of the border fence along nearly 500 miles of the United States' border with Mexico. The Secretary's orders also purported to preempt "state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the waived federal statutes.

The Secretary claimed authority for these orders under Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act, as amended, which grants the Secretary "authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads" along the United States' border. 8 U.S.C. § 1103 note. Section 102(c) forecloses judicial review of the Secretary's waivers except for actions brought in federal district court alleging violations of the Constitution of the United States. A district court's decision may be reviewed only through a petition for writ of certiorari to this Court. The questions presented are:

1. Whether the grant of authority to the Secretary of Homeland Security to "waive all legal requirements" necessary to ensure rapid construction of a border fence, with no provision for judicial review to test the statutory and factual basis of the Secretary's waiver orders, is an unconstitutional delegation of legislative power.

2. Whether a general delegation of authority to "waive all legal requirements" is sufficient to permit the Secretary of Homeland Security to declare preempted every state and local law "related to" the thirty-seven waived federal statutes.

RULE 14.1(b) STATEMENT

Petitioners (plaintiffs below) are County of El Paso, City of El Paso, El Paso County Water Improvement District No. 1, Hudspeth County Conservation and Reclamation District No. 1, Ysleta del Sur Pueblo, Frontera Audubon Society, Friends of the Wildlife Corridor, Friends of Laguna Atascosa National Wildlife Refuge, and Mark Clark.

Respondents (defendants below) are Michael Chertoff, Secretary, U.S. Department of Homeland Security, and the U.S. Department of Homeland Security.

RULE 29.6 STATEMENT

Frontera Audubon Society, Friends of the Wildlife Corridor, and Friends of Laguna Atascosa National Wildlife Refuge state that none of them has a parent corporation and no publicly held corporation owns ten percent or more of the stock of any of the organizations.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 14.1(B) STATEMENT ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 4

A. Statutory Background 6

B. Proceedings Below 7

REASONS FOR GRANTING THE PETITION 10

I. The Court Should Grant Certiorari To Resolve The Important Question, Which Has Divided The Lower Courts, Whether Broad Delegations Of Discretionary Authority That Impinge On Private Rights Must Be Subject To Judicial Review. 11

A. This Court's Decisions Recognize That Judicial Review Is Essential To Uphold A Delegation In This Context. 12

B. The Lower Courts Have Reached Conflicting Conclusions Regarding The Necessity Of Judicial Review. 15

TABLE OF CONTENTS—continued

Page

C. The Preclusion Of Judicial Review Makes The Secretary The Sole Arbiter Of All Issues Relating To The Scope Of His Waiver Authority, Effectively Nullifying Any Limitations Imposed By Congress. 18

II. The Court Should Grant Review To Resolve The Important Question Whether A Clear And Unequivocal Grant Of Authority Is Required To Permit An Executive Branch Agency To Preempt State Law On Its Own Authority. 21

III. The Questions Presented Are Important. 29

CONCLUSION 34

APPENDIX A: Department of Homeland Security, Office of the Secretary, Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19077 (Apr. 8, 2008) 1a

APPENDIX B: Department of Homeland Security, Office of the Secretary, Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19078 (Apr. 8, 2008) 7a

TABLE OF CONTENTS—continued

Page

APPENDIX C: Memorandum Opinion and Order Denying Plaintiffs' Application for Preliminary Injunction 18a

APPENDIX D: Order Granting Defendants' Motion To Dismiss 49a

TABLE OF AUTHORITIES

Page(s)

CASES

Alden v. *Maine*, 527 U.S. 706 (1999) 22

Amalgamated Meat Cutters v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971) 16

American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 12, 13, 18

Association of International Automobile Manufacturers v. *Commissioner*, 208 F.3d 1 (1st Cir. 2000) 26

Clinton v. *New York*, 524 U.S. 417 (1998) 30

Colorado Public Utilities Commission v. *Harmon*, 951 F.2d 1571 (10th Cir. 1991) 26

CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993) 28

Defenders of Wildlife v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 128 S.Ct. 2962 (June 23, 2008) 12, 31, 32

Fellner v. *Tri-Union Seafoods, L.L.C.*, 539 F.3d 237 (3d Cir. 2008) 26

Fidelity Federal Savings & Loan Association v. *de la Cuesta*, 458 U.S. 141 (1982) 27, 28

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 27

Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) 27

Green Mountain Railroad Corp. v. *Vermont*, 404 F.3d 638 (2d Cir. 2005) 26

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 27

TABLE OF AUTHORITIES—continued

Page(s)

J.W. Hampton, Jr. & Co. v. *United States*,
276 U.S. 394 (1928) 13

Jones v. *Rath Packing Co.*,
430 U.S. 519 (1977) 22

Louisiana Public Service Commission v. *FCC*,
476 U.S. 355 (1986) 23

Massachusetts v. *U.S. Department of Transportation*,
93 F.3d 890 (D.C. Cir. 1996) 26

Mistretta v. *United States*,
488 U.S. 361 (1989) 13, 14

Morales v. *Trans World Airlines, Inc.*,
504 U.S. 374 (1992) 28

Printz v. *United States*,
521 U.S. 898 (1997) 22

Rice v. *Santa Fe Elevator Corp.*,
331 U.S. 218 (1947) 22

Skinner v. *Mid-America Pipeline Co.*,
490 U.S. 212 (1989) 13

South Dakota v. *Department of Interior*,
69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996) 16, 17

State Farm Bank v. *Reardon*,
539 F.3d 336 (6th Cir. 2008) 26

Touby v. *United States*,
500 U.S. 160 (1991) 12, 14, 15, 17

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Bozarov*,
974 F.2d 1037 (9th Cir. 1992) 15

United States v. *Widdowson*,
916 F.2d 587 (10th Cir. 1990), *vacated*,
502 U.S. 801 (1991)..... 16, 17

Watters v. *Wachovia Bank, N.A.*,
127 S. Ct. 1559 (2007)..... 25, 26

Whitman v. *American Trucking Associations*,
531 U.S. 457 (2001)..... 9

Wisconsin Public Intervenor v. *Mortier*,
501 U.S. 597 (1991)..... 22

Yakus v. *United States*,
321 U.S. 414 (1944)..... 13

CONSTITUTIONS, STATUTES, RULES, AND REGULATIONS

Constitution of the United States

Art. I, § 1 ..... 1, 12

Art. VI, cl. 2..... 22

Amend. X..... 1

Administrative Procedure Act,
5 U.S.C. § 551 *et seq*..... 4, 6

Balanced Budget and Emergency Deficit
Control Act of 1985,
2 U.S.C. §§ 901 & 922(b) 30

Bipartisan Campaign Reform Act of 2002,
2 U.S.C. §§ 437h note 30

TABLE OF AUTHORITIES—continued

Page(s)

Endangered Species Act,
16 U.S.C. § 1531 *et seq*. 6, 10

Federal Grant & Cooperative Agreement Act,
31 U.S.C. §§ 6303-6308. 5

Federal Land Policy Management Act,
43 U.S.C. § 1701 *et seq*. 4

National Environmental Policy Act,
42 U.S.C. § 4321 *et seq*. 6, 10

Religious Freedom Restoration Act,
42 U.S.C. § 2000bb note 5

Trans-Alaskan Pipeline Act,
43 U.S.C. § 1652. 30

5 U.S.C. § 609(e) 23

5 U.S.C. § 8137 23

7 U.S.C. § 1308-3a(2)(A)(ii) 23

8 U.S.C. § 1324a 23

21 U.S.C. § 360k(a) & (b) 24

29 U.S.C. § 1144 24

30 U.S.C. § 1254(g) 24

46 U.S.C. § 31307 24

49 U.S.C. § 31141(a) 24

Economic Stabilization Act of 1970 16

Homeland Security Act of 2002, Pub. L. No.
107-296, § 1511, 116 Stat. 2309 7

TABLE OF AUTHORITIES—continued

Page(s)

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, tit. I, 110 Stat. 3009-554, as amended ..... *passim*

Line Item Veto Act of 1996, Pub. L. No 104-130, 110 Stat. 1200 (formerly codified at 2 U.S.C. § 692) 30

REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, 119 Stat. 302 ..... 7, 10, 28

Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1168 (1980) 23

72 Fed. Reg. 60870 (Oct. 26, 2007) 8

73 Fed. Reg. 19077 (Apr. 8, 2008) 3, 8

73 Fed. Reg. 19078 (Apr. 8, 2008) 3, 4, 8

MISCELLANEOUS

California Coastal Commission, *W 13a Revised Staff Report and Recommendation on Consistency Determination* 14 (CD-063-03) (2003), *available at* http://www.coastal.ca.gov/ccd/W13a-2-2004.pdf 10

Kenneth Starr et al., *The Law of Preemption: A Report of the Appellate Judges Conference, American Bar Association* 40 (1991) 25

TABLE OF AUTHORITIES—continued

Page(s)

U.S. Customs and Border Protection, *CBP Offers Landowners Additional Consultation on Border Fence*, http://www.cbp.gov/xp/cgov/newsroom/ news_releases/nov_2008/ 11192008.xml 32

PETITION FOR A WRIT OF CERTIORARI

Petitioners, County of El Paso, City of El Paso, El Paso County Water Improvement District No. 1, Hudspeth County Conservation and Reclamation District No. 1, Ysleta Del Sur Pueblo, Frontera Audubon Society, Friends of the Wildlife Corridor, Friends of Laguna Atascosa National Wildlife Refuge, and Mark Clark, respectfully petition for a writ of certiorari to review the judgment of the District Court for the Western District of Texas in this case.

OPINIONS BELOW

The opinion of the district court (App., *infra*, 49a-55a) dismissing petitioners' complaint is not reported. The opinion of the district court (App., *infra*, 18a-48a) denying petitioners' motion for preliminary injunction is not reported.

JURISDICTION

The judgment of the district court was entered on September 11, 2008 (App, *infra*, 55a). This Court's jurisdiction rests on Section 102(c)(2)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 8 U.S.C. § 1103 note.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. U.S. Const. Art. I, § 1 provides in relevant part:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. U.S. Const. Amend. X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 8 U.S.C. § 1103 note, provides in relevant part:

> (a) In general.—The Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.
>
> * * * *
>
> (c) Waiver.—
>
> (1) In general.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.
>
> * * * *

(2) Federal court review.—

(A) In general.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

(B) Time for filing of complaint.—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

(C) Ability to seek appellate review.—An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

4. The Secretary's Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 73 Fed. Reg. 19077 (Apr. 8, 2008), is reprinted at App., *infra*, 1a.

5. The Secretary's Determination Pursuant to Section 102 of the Illegal Immigration Reform and

Immigrant Responsibility Act of 1996, as amended, 73 Fed. Reg. 19078 (Apr. 8, 2008), is reprinted at App., *infra*, 7a.

STATEMENT

Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) delegates sweeping authority to a single unelected official, authorizing the Secretary of Homeland Security "to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction" of barriers and roads in the vicinity of the Nation's international border. IIRIRA § 102(c)(1), as amended, 8 U.S.C. § 1103 note ("Section 102(c)").

IIRIRA's waiver provision is unprecedented. Not only does the Secretary retain "sole discretion" to determine when a waiver is appropriate, but the Act imposes no restrictions on the type of "legal requirement" he may waive. Capping off the extraordinary features of this statutory scheme, the Secretary's exercise of discretion is immune from judicial review to ensure compliance with the statutory standard and other administrative law requirements. Challenges to the Secretary's actions under Section 102(c) "may only be brought alleging a violation of the Constitution of the United States." Section 102(c)(2)(A).

In the orders at issue here, the Secretary has taken full advantage of this limitless and unreviewable delegation of power, purporting to waive not only a host of federal environmental, historic, and cultural preservation laws, but also basic framework laws like the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*; the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*;

the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb note; and the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 6303-6308 – some thirty-seven federal laws in all.

Moreover, the Secretary purported to "waive" all state and other laws "deriving from, or related to the subject of" these waived federal laws, without further identifying which state or "other laws" he intended to waive. The Secretary further "reserve[d] the authority to make further waivers from time to time as [he] may determine to be necessary." App., *infra*, 5a, 17a. The effect is to render the considerable physical area surrounding the border fence a legal no-man's land, subject to the unfettered discretion of the Secretary.

The Secretary's orders provide no explanation for the selection of statutes waived, no reasons why the statutory standard is satisfied, and no guidance concerning which local and state laws are "deriv[ed] from or relate[d] to" the federal statutes he has suspended. App., *infra*, 4a, 15a. The orders are unclear as to whether the Secretary has merely exempted himself from the laws' effects or whether the waived laws no longer apply to other persons or government entities engaged in activities within the zone of the waivers. Neither do the waivers indicate whether the affected laws are waived only during the period of construction or are waived indefinitely (as ongoing "upkeep" of fences, roads, supporting elements, and the like continues). Finally, although the orders identify by mileposts the length of the area affected, they do not specify the width of the area covered by the waivers. App., *infra*, 4a, 15a.

Section 102(c)'s extraordinarily broad delegation of power and the vagueness of the Secretary's orders would be less objectionable if aggrieved parties were

able to seek judicial review of the Secretary's actions. Ordinarily such review, if not otherwise provided for by statute, would be available under Section 704 of the APA, 5 U.S.C. § 704. The Secretary, however, has waived the APA. App., *infra*, 5a, 16a. Even if he had not, Section 102(c) categorically bars claims challenging the Secretary's compliance with the statute's substantive requirements, including the requirement that a waiver be "necessary to ensure expeditious construction of the barriers and roads" as authorized by the Section, and claims seeking interpretation or clarification of the Secretary's orders. It also precludes litigation in the state courts and all intermediate federal appellate review related to the Secretary's orders. The result is that Section 102(c) leaves aggrieved parties with no means of ensuring that the Secretary's waiver authority is exercised in accordance with the statute's prescribed limits, except by challenging the constitutional validity of the grant of authority itself. This Court is the only appellate court with jurisdiction to resolve that claim.

A. Statutory Background

In 1996, Congress directed the Attorney General to construct barriers and roads along the U.S. international border to deter illegal crossings. IIRIRA, Pub. L. No. 104-208, div. C, tit. I, § 102(a), 110 Stat. 3009-554 (codified as amended at 8 U.S.C. § 1103 note). As originally enacted, IIRIRA provided that, if and to the extent the Attorney General determined it was necessary, the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, were waived "to ensure expeditious construction of the barriers and roads" along the border. § 102(c), 110 Stat. at 3009-555.

The Act included no special review provision and did not preclude judicial review of the Attorney General's determinations. In 2002, Congress transferred oversight of the border fence project, along with many of the Attorney General's other responsibilities, to the newly created Secretary of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 1511, 1517, 116 Stat. 2309, 2311.

Three years later, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, 119 Stat. 302 (codified at 8 U.S.C. § 1103 note), as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005. That Act greatly expanded the scope of the Secretary's waiver authority to include not merely ESA and NEPA but "all legal requirements," transferring the decision regarding the legal requirements subject to waiver from Congress to the Secretary "in [his] sole discretion." REAL ID Act § 102(c)(1).

The Act also radically restricted the scope of judicial review of the Secretary's waiver decisions. The district courts are now permitted to hear only "[a] cause of action or claim * * * alleging a violation of the Constitution of the United States." *Id.* § 102(c)(2)(A). Further, "[a] claim shall be barred unless it is filed within" sixty days of the Secretary's decision. *Id.* § 102(c)(2)(B). A ruling by a district court under this provision may only be reviewed "upon petition for a writ of certiorari to the Supreme Court of the United States." *Id.* § 102(c)(2)(C).

B. Proceedings Below

On April 3, 2008, Secretary of Homeland Security Michael Chertoff, invoking his authority under Section 102(c), issued two orders waiving "all federal, state, or other laws, regulations and legal require-

ments of, deriving from, or related to the subject of" more than three dozen federal statutes. 73 Fed. Reg. 19077 (Apr. 8, 2008) (Hidalgo County waiver) (reprinted at App., *infra*, 1a); 73 Fed. Reg. 19078 (Apr. 8, 2008) (multistate waiver) (reprinted at App., *infra*, 7a). The two orders' combined abrogation of existing federal and state statutory rights covers nearly 500 miles of territory along the U.S.-Mexico border, an area crossing through four states. They are the fourth and fifth waivers, respectively, that the Secretary has issued under the IIRIRA authority and encompass nearly twice as many federal statutes as the largest previous waiver. 72 Fed. Reg. 60870 (Oct. 26, 2007) (waiving twenty federal statutes).

Petitioners – local government entities, an American Indian tribe, environmental groups, and an individual Texas resident – filed suit on June 2, 2008, in United States District Court for the Western District of Texas, challenging the constitutionality of the broad delegation of authority to the Secretary to waive any laws that he deemed impediments to rapid construction of the border fence. Petitioners argued (1) that granting the Secretary unlimited waiver authority while precluding judicial review for compliance with statutory requirements constitutes an unconstitutional delegation of legislative authority, and (2) Section 102(c) does not contain a sufficiently clear delegation to permit the Secretary to declare state and local law preempted on his own authority.

In affidavits filed in the district court, petitioners averred that they face a variety of serious potential harms as a result of the Secretary's orders. For example, the Secretary's waivers of federal and state law compromise the Ysleta del Sur Pueblo Indian tribe's ability to protect sacred grounds along the Rio Grande that have been used for more than 300 years

to perform religious and cultural ceremonies. Similarly, the waivers may jeopardize the ability of the El Paso County Water Improvement District No. 1 and the Hudspeth County Conservation and Reclamation District No. 1 to fulfill their statutory mandates to deliver water to the City of El Paso and to thousands of farmers throughout El Paso and Hudspeth Counties.

The district court denied petitioners' motion for a preliminary injunction and thereafter granted respondents' motion to dismiss. The court found that the statute's preclusion of judicial review did not render the broad delegation of authority unconstitutional. App., *infra*, 30a-31a. Referring to this Court's decision in *Whitman* v. *American Trucking Associations*, 531 U.S. 457 (2001), the district court found that, no matter how sweeping the delegation or negligible the judicial review, the Constitution requires only that "Congress * * * provide an intelligible principle to guide the exercise of delegated authority." App., *infra*, 30a. The court concluded that petitioners had not "presented any cases in which the Supreme Court struck down a statute explicitly for lack of judicial review in the intelligible principle analysis," that "other courts have held the Supreme Court does not require judicial review in the intelligible principle analysis," and that "the Waiver Legislation does not preclude judicial review entirely because parties can petition for certiorari to the Supreme Court." App., *infra*, 32a.

Turning to petitioners' federalism arguments, the district court acknowledged that this Court has held Congress must clearly delegate authority before an executive official can preempt state law. But the district court deferred to the Secretary's argument that Section 102(c) satisfies the clear statement re-

quirement, because the statute "clearly manifests congressional intent to nullify other laws to the extent necessary to expeditiously construct the border fence." App., *infra*, 40a. Alternatively, the district court concluded that the Secretary's declaration of preemption could be upheld as a species of conflict preemption, since the Secretary "has only waived state and local laws which interfere with Congress's purpose to construct the border barrier." App., *infra*, 40a. The court did not advert to the fact that, because Section 102(c) precludes all judicial review sixty days after the issuance of a waiver order, the determination of the scope of this "conflict preemption" will lie in the unreviewable discretion of the Secretary of Homeland Security.

REASONS FOR GRANTING THE PETITION

When Congress enacted the original version of the provision at issue here in 1996, Congress itself determined that two statutes – the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 – would be suspended if the Attorney General determined such suspension was necessary to ensure expeditious construction of a border fence. § 102(c), 110 Stat. 3009-555. The Act contained no limits on judicial review of the Attorney General's necessity determinations. The Attorney General undertook construction of the first segment of the border fence without ever deeming it "necessary" to give effect to Congress's waiver of ESA or NEPA. Cal. Coastal Comm'n, *W 13a Revised Staff Report and Recommendation on Consistency Determination* 14 (CD-063-03) (2003), *available at* http://www.coastal.ca.gov/ccd/W13a-2-2004.pdf.

With the 2005 REAL ID Act amendments, Congress adopted a substantially different scheme, one

that impermissibly delegated legislative authority to the Secretary. Rather than specifying particular federal laws that would be waived upon an administrative determination of necessity, subject to the ordinary testing through judicial review, the revised Section 102(c) confers on the Secretary the unfettered choice of *what laws to waive*. And although the statute preserves the requirement that the Secretary's waiver authority be exercised only when "necessary," the Act's preclusion of judicial review to enforce this standard renders meaningless what might otherwise be an "intelligible principle." The Act thus permits the Secretary to eliminate the constraints imposed by any federal law, on the Secretary's mere assertion that such abrogation is "necessary" to assure rapid construction of the fence.

In addition, the Secretary's interpretation of the Act as authorizing administrative preemption of state and local laws lacks support in the text of the statute. If allowed to stand, the Secretary's order would constitute an unprecedented expansion of agency authority to preempt state and local law without clear congressional authority – and without any oversight by any court. This Court's intervention is essential to protect state and local legislative authority from unreviewable federal administrative preemption.

I. The Court Should Grant Certiorari To Resolve The Important Question, Which Has Divided The Lower Courts, Whether Broad Delegations Of Discretionary Authority That Impinge On Private Rights Must Be Subject To Judicial Review.

Although this Court has repeatedly pointed to the availability of judicial review in rejecting consti-

tutional challenges to congressional delegations of authority, the lower courts are divided as to whether judicial review is essential to the constitutionality of broad delegations of legislative power to agencies. This Court should grant review to resolve this important question.[1]

A. This Court's Decisions Recognize That Judicial Review Is Essential To Uphold A Delegation In This Context.

"The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.' From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby* v. *United States*, 500 U.S. 160, 164-65 (1991) (quoting U.S. Const., Art. I, § 1) (internal citations omitted).

Notwithstanding this fundamental constitutional limitation, there is little doubt that Congress can delegate power to executive-branch agencies in broad terms. As the Court noted in *American Power & Light Co.* v. *SEC*, "judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems." 329 U.S. 90, 105 (1946). The settled understanding that has emerged is that a delegation of discretionary power to the Executive Branch is permissible so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body author-

---

[1] As discussed below (at 31-32), the issue is presented more clearly in this case, and with much greater practical consequences, than it was in *Defenders of Wildlife* v. *Chertoff*, 128 S.Ct. 2962 (June 23, 2008).

ized to [exercise the delegated authority] is directed to conform." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)).

Yet where the exercise of broad delegated power threatens private rights, the availability of judicial review provides a crucial safeguard against the possible abuse by the executive of a broad delegation of power. Starting with its decision in *Yakus* v. *United States*, 321 U.S. 414 (1944), this Court has repeatedly underscored the importance of judicial review in sustaining the constitutionality of broad legislative delegations. The very purpose of requiring that Congress lay down an "intelligible principle," the Court explained, is to be able "in a proper proceeding to ascertain whether the will of Congress had been obeyed." *Id.* at 426.

The Court elaborated on this understanding in *American Power & Light Co.*: It is "constitutionally sufficient," the Court explained, "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. *Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.*" 329 U.S. at 105 (emphasis added).

The Court has reaffirmed this commitment to the importance of judicial review in permitting broad delegations in a number of recent cases. See, *e.g.*, *Mistretta*, 488 U.S. at 379 (reiterating that a permissible intelligible principle may be tested "in a proper proceeding" (quoting *Yakus*, 321 U.S. at 425-426)); *Skinner* v. *Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989) (allowing delegation pursuant to principles articulated "such that a court could 'ascertain whether

the will of Congress has been obeyed'" (quoting *Mistretta*, 488 U.S. at 379)).

The question whether a broad delegation affecting private rights is constitutional in the absence of judicial review was squarely presented in *Touby* v. *United States*, 500 U.S. 160 (1991). At issue was an amendment to the Controlled Substances Act that permitted the Attorney General temporarily to schedule new "designer drugs" as controlled substances on an expedited basis. The Act expressly provided that a decision temporarily to schedule such a drug was "not subject to judicial review." *Id.* at 168. The petitioner argued that this feature of the statute rendered the delegation unconstitutional.

This Court did not dispute that judicial review is required; it concluded that judicial review was in fact available under the Act. Although a pre-enforcement challenge to a temporary scheduling of a new drug was foreclosed, an individual facing criminal charges based on a violation involving a temporarily scheduled drug was free to bring a challenge to the Attorney General's order by way of a defense to prosecution. 500 U.S. at 168. This post-enforcement review, the Court found, was "sufficient to permit a court to ascertain whether the will of Congress has been obeyed." *Id.* at 168-169 (citation omitted). Two concurring Justices would have made it explicit that "[w]e must * * * read the Controlled Substances Act as preserving judicial review of a temporary scheduling order in the course of a criminal prosecution in order to save the Act's delegation of lawmaking power from unconstitutionality." *Id.* at 170 (Marshall, J., joined by Blackmun, J.).

B. The Lower Courts Have Reached Conflicting Conclusions Regarding The Necessity Of Judicial Review.

Both before and after *Touby*, lower federal courts have reached conflicting conclusions regarding whether judicial review is a necessary condition for sustaining a broad delegation of discretionary authority that impinges on private rights. This Court should grant review to resolve the persistent conflict among the lower federal courts on this important and far-reaching question.

The district court's decision here, along with each of the other district court decisions considering the constitutionality of the waiver authority delegated by Section 102(c), is consistent with a decision of the Ninth Circuit, *United States* v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992). *Bozarov* involved a non-delegation challenge to the Export Administration Act. Rejecting the appellee's contention that the absence of judicial review rendered that Act unconstitutional, the court determined that "the purpose of an intelligible principle is simply to channel the discretion of the executive and to permit *Congress* to determine whether its will is being obeyed." *Id.* at 1041 (emphasis added).

The Ninth Circuit is not the only Court of Appeals to confront this question, but it is the only one to conclude, as the court below did, that judicial review is dispensable in the intelligible principle analysis. Hence the decision below is at odds with decisions of the Eighth and Tenth Circuits, and a prominent three-judge court decision from the District of Columbia, all of which appreciated that a permissible intelligible principle for the exercise of delegated power must be susceptible of analysis by a

court. See *South Dakota* v. *Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996); *United States* v. *Widdowson*, 916 F.2d 587 (10th Cir. 1990), *vacated*, 502 U.S. 801 (1991); *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737, (D.D.C. 1971).

In *Amalgamated Meat Cutters* v. *Connally*, a three-judge district court panel upheld the Economic Stabilization Act of 1970 against a non-delegation challenge. Central to the decision was the court's conclusion that decisions taken under the Act were subject to judicial review under sections 701-706 of the APA. 337 F. Supp. at 760. Speaking for the court, Judge Leventhal explained that "[t]he safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers." *Id.* at 759.

In *South Dakota* v. *Department of Interior*, the Eighth Circuit struck down as unconstitutional a section of the Indian Reorganization Act authorizing the Secretary of the Interior to acquire land in trust for Indians because the statute's preclusion of judicial review failed to "ensure[] that courts charged with reviewing the exercise of delegated discretion will be able to test that exercise against ascertainable standards." 69 F.3d at 885. The court determined that judicial review was an essential criterion of the non-delegation doctrine and "derivative" of the requirement that Congress provide an intelligible principle. *Ibid.*

Following the Eighth Circuit's decision, the Secretary of the Interior promulgated a new regulation that provided for judicial review. The Solicitor General sought certiorari and urged this Court to vacate the Eighth Circuit's decision and remand for recon-

sideration in light of the new regulation, which this Court did. *Dep't of Interior* v. *South Dakota*, 519 U.S. 919 (1996). Far from undermining the force of the Eighth Circuit's decision, the procedural history of *South Dakota* reveals that the Interior Department and the Solicitor General regarded it as, at the very least, a serious question whether a broad delegation without judicial review would be upheld as constitutional.

The Tenth Circuit, in *United States* v. *Widdowson*, likewise struck down a legislative delegation because it failed to provide for judicial review. 916 F.2d at 59. *Widdowson* presented the same question this Court confronted in *Touby*, and the Tenth Circuit concluded that the preclusion of judicial review of temporarily scheduled designer drugs rendered the statute unconstitutional. *Ibid.* This Court vacated the opinion and remanded the case in light of *Touby*, which found that the act at issue *did* provide adequate judicial review of the Attorney General's temporary scheduling orders. *United States* v. *Widdowson*, 502 U.S. 801, 801 (1991); see *Touby*, 500 U.S. at 168-170. Again, the Court's action did not undermine the reasoning of the Tenth Circuit, but indicated only that the serious constitutional question should have been avoided.

In this case, the question cannot be avoided. Congress has provided that the district court shall have "exclusive jurisdiction to hear all causes or claims arising from any action undertaken" pursuant to the waiver authority, and that the only claims that may be brought are those "alleging a violation of the Constitution of the United States." Section 102(c)(2). Thus, claims challenging the statutory or factual basis of waiver decisions, or seeking clarification of the many uncertainties raised by the cryptic

language of the waiver orders, are expressly precluded. In addition, the Secretary has waived the APA. The only way petitioners can obtain judicial review is by securing a ruling from this Court that the preclusion of review in Section 102(c)(2) is unconstitutional.

C. The Preclusion Of Judicial Review Makes The Secretary The Sole Arbiter Of All Issues Relating To The Scope Of His Waiver Authority, Effectively Nullifying Any Limitations Imposed By Congress.

Judicial review, as this court explained in *American Power*, is of vital importance to ensure that executive branch officials adhere to the boundaries of their delegated authority. 329 U.S. at 105-106. The orders at issue in this case illustrate the importance of this protection. The Secretary did not merely waive more than three dozen federal statutes – he also purported to interpret the statutory language, defining "construction" to include, among other things, "*upkeep* of fences, roads, supporting elements, drainage, erosion controls, safety features, surveillance, communication, and detection equipment of all types, radar and radio towers, and lighting." App., *infra*, 4a, 15a (emphasis added). This interpretation is seemingly at odds with the statute's plain command that the Secretary exercise his waiver authority only where "necessary to ensure expeditious *construction*" – not "upkeep" – of the border fence. Section 102(c)(1) (emphasis added). Given Section 102(c)'s preclusion of judicial review for all but constitutional questions, however, there is no way aggrieved parties can challenge the Secretary's expansive interpretation of his own power. The combina-

tion of a broad delegation and the preclusion of review permits the Secretary to extend the waivers' duration indefinitely.

The uncertainty surrounding the duration of the waivers is not the only ambiguity in the Secretary's orders. It is also unclear whether the Secretary was exempting only himself from compliance with various federal, state, and local laws, or whether he was declaring all persons and governmental entities exempt from these legal requirements. Disputes may well arise in the future about this issue. Likewise, it is unclear how wide a swathe of land is covered by the orders. Under the terms of the statute, the only legal authority capable of resolving these and other possibly unforeseeable disputes is the Secretary himself. No state or local government body or private citizen will have any recourse to any court if the Secretary fails to resolve the dispute, or does so in a way the aggrieved party regards as unlawful.

In addition, as we discuss more fully in Section II, *infra*, in each of the two orders at issue here the Secretary also accorded his actions preemptive force. This Court has never permitted an executive agency, pursuant to a vague and general delegation of regulatory power, to preempt state law on its own authority. Yet the preclusion of review strips aggrieved parties of any means of challenging future "interpretations" by the Secretary of the scope of his declaration of preemption. The statute in effect allows the Secretary to determine the scope of his powers *vis-à-vis* those of state and local governments, without any judicial check.

The potential impairment of private rights by the Secretary's orders is further compounded by Section 102(c)'s inordinately short statute of limitations.

While the statute purports to permit the district courts to hear "claim[s] * * * alleging a violation of the Constitution," such actions must be filed within sixty days of the date of the Secretary's *waiver* order – not sixty days from the infliction of any harm (even of constitutional stature) caused thereby. Section 102(c)(2)(A). And, as discussed below, Section II, *infra*, the district court's decision means the Secretary need not provide *any* notice of his abrogation of state and local law. Absent judicial review, the Secretary's ambiguous preemption of unenumerated state and local laws "of, deriving from, or related to the subject of" the federal statutes he has waived confers upon him the otherwise judicial function of determining whether and when state laws have been displaced by his actions once the sixty day clock has run. App., *infra*, 4a, 15a.

Recognizing a right to judicial review where broad legislative delegations impinge on private rights would not mean that all executive action would be subject to judicial review. Petitioners acknowledged in the court below that judicial review of agency action may be unavailable in circumstances when the "delegated authority falls squarely within the independent authority of the Executive and thus does not require an 'intelligible principle.'" App., *infra*, 28a-29a. Delegations directly to the President, the exercise of prosecutorial discretion, allocations of lump-sum appropriations, and agency determinations that affect only public, as opposed to private, rights comprise narrow but well-recognized exceptions to the general presumption of reviewability.

The Secretary's waiver authority falls well outside any of these areas. Section 102(c) delegates waiver authority directly to the Secretary, not to the President. The decision to abrogate federal, state,

and local law is scarcely analogous to core executive functions like prosecutorial discretion or budgeting. And in this case, the Secretary's actions may affect private, as well as public, rights. The record developed below indicates that the orders, for example, may interfere with valuable water rights currently held by municipal water authorities and the rights of the many private individuals and firms that purchase water from these authorities. They may also jeopardize access of American Indian tribes to their traditional burial grounds.

Congress's delegation of unprecedented and practically unlimited power to nullify federal and state law, combined with the elimination of meaningful judicial review of the Secretary's actions, leaves the separation of powers in tatters. This Court's review is plainly warranted to end the dispute among the federal courts over whether broad delegations of discretionary authority affecting private rights must be cabined by judicial review, and to clarify that Section 102(c)'s preclusion of judicial review to ensure compliance with the statute's standard renders Section 102(c) an unconstitutional delegation of legislative power.

II. The Court Should Grant Review To Resolve The Important Question Whether A Clear And Unequivocal Grant Of Authority Is Required To Permit An Executive Branch Agency To Preempt State Law On Its Own Authority.

The Court's intervention is also warranted because of the grievous blow the district court's decision deals to fundamental principles of constitutional federalism. "[N]umerous constitutional provisions, * * * not only those, like the Tenth Amend-

ment, that speak to the point explicitly" establish a system of "dual sovereignty," *Printz* v. *United States*, 521 U.S. 898, 923 n.13 (1997) (citation omitted), under which the states "retain 'a residuary and inviolable sovereignty.'" *Alden* v. *Maine*, 527 U.S. 706, 714-715 (1999) (quoting The Federalist No. 39 (James Madison)). This Court has repeatedly made clear that state sovereignty is "not to be superseded * * * unless that was the clear and manifest purpose of Congress." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citing *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Yet there is nothing clear or manifest in Section 102(c) to suggest that Congress has delegated power to the Secretary to preempt state or local laws. In fact, Section 102(c) is silent about preemption. As this Court has made clear, where preemption is concerned, "mere silence * * * cannot suffice to establish the 'clear and manifest purpose' to preempt local authority." *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607 (1991) (citing *Rice*, 331 U.S. at 230).

Under the Supremacy Clause, federal officials have no inherent authority to declare state laws preempted. The Supremacy Clause identifies three sources of federal law as "the supreme law of the land" and hence as potential sources of preemption of state law: the Constitution, treaties, and the laws of the United States which shall be made "in Pursuance" of the Constitution. U.S. Const. Art. VI, cl. 2. Federal agencies obviously have no authority to amend the Constitution, enter into treaties, or adopt supreme "laws" on their own initiative. Consistent with the Supremacy Clause, only agency action based on a delegation of authority from Congress and having the force of law can qualify as a source of preemption. Agency authority to preempt, in other

words, requires a clear and unequivocal delegation of preemptive authority from Congress.

This Court has recognized as much. In *Louisiana Public Service Commission* v. *FCC*, the Court rejected the FCC's contention that it could preempt state regulation to "effectuate a federal policy" absent Congressional authorization. 476 U.S. 355, 374 (1986). The Court, extensively reviewing its preemption case law, was "both unwilling and unable" to "grant to the agency the power to override Congress" by permitting the agency to "confer power on itself." *Id.* at 374-75.

The district court in this case offered for upholding the Secretary's assertion of power to preempt state and local laws. Neither satisfies the constitutional standard.

1. The first justification advanced by the district court was that Section 102(c) is itself an express preemption clause, that is, an express delegation of authority to the Secretary to preempt. This claim is untenable. Section 102(c) authorizes the Secretary to "waive" laws that might, in his judgment, impede the expeditious construction of the border fence. Federal officials are occasionally given authority to waive federal laws that they are charged with administering. See, *e.g.*, 5 U.S.C. § 609(e) (empowering Chief Counsel for Advocacy to waive certain federal rulemaking review requirements of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1168 (1980), upon his written finding); 5 U.S.C. § 8137 (allowing Secretary of Labor to waive provisions of federal law governing payment to non-citizens and non-residents for work-related injuries); 7 U.S.C. § 1308-3a(2)(A)(ii) (granting Secretary of Agriculture power to preserve environmentally sensitive land through

case-by-case waivers of income requirements otherwise applicable to federal farm assistance). But federal officials have no authority to "*waive*" state laws. State laws can be *preempted* only when they conflict with or frustrate federal laws, or when Congress clearly intends that state laws be displaced.

When Congress delegates authority to an agency to preempt, it uses precise terms like "preempt" or "supersede" or otherwise makes its intent to confer preemptive authority clear.[2] Petitioners are aware of no instance in which a court has construed an authority to "waive" laws to mean or imply an authority to "preempt."

---

[2] See, *e.g.*, 49 U.S.C. § 31141(a) ("Preemption after decision. A State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced."); 30 U.S.C. § 1254(g) (preempting any statute that conflicts with "the purposes and the requirements of this chapter" and permitting the Secretary of the Interior to "set forth any State law or regulation which is preempted and superseded"); 21 U.S.C. § 360k(a) & (b) (establishing that "no State or political subdivision of a State may establish or continue in effect" any requirement with respect to a medical device, unless the Secretary, "by regulation promulgated after notice and opportunity for an oral hearing, exempt[s] * * * a requirement of such State or political subdivision"). Congress uses similar language in express preemption clauses more generally. See, *e.g.*, 29 U.S.C. § 1144 ("[T]his chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title * * *."); 46 U.S.C. § 31307 ("This chapter supersedes any State statute conferring a lien on a vessel * * *."); 8 U.S.C. § 1324a ("(2) Preemption. The provisions of this section preempt any State or local law imposing civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

Although the district court found that Section 102(c) "is not ambiguous" in expressing Congress's intent to preempt, App., *infra*, 39a, the court rested this conclusion not on an analysis of the language Congress used, but rather on what it characterized as the Secretary's "clarifi[cation] that 'all legal requirements' includes 'state or other laws.'" App., *infra*, 39a-40a. In other words, it was the Secretary's interpretation of his own authority, not the language of the statute, that supplied the basis for the court's conclusion that "Section 102 clearly manifests congressional intent to nullify [state and] other laws." App., *infra*, 40a.

The district court's deference to the Secretary's interpretation of his own authority was manifestly inappropriate. Such deference undercuts the very purpose of the "clear and manifest" requirement of *Rath Packing*, 430 U.S. at 525. A clear and manifest statement of preemptive intent *by Congress* is required precisely to protect against agency overreaching that threatens the dual system of government that "ensures our liberties, representation, diversity, and effective governance." Kenneth Starr et al., *The Law of Preemption: A Report of the Appellate Judges Conference, American Bar Association* 40 (1991).

This Court has never permitted an agency such wide interpretive latitude where preemption is at issue. In *Watters* v. *Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), the Court was presented with a request that it defer to the judgment of the Office of the Comptroller of the Currency that certain state banking visitorial regulations were preempted. A majority of the Court resolved the case without addressing whether deference to the agency on preemption was appropriate. *Id.* at 1572-1573. Three dissenting Justices stated that whether deference was owed to the

agency was the "most pressing" question presented by the case. *Id.* at 1582 (Stevens, J. dissenting, joined by Roberts, C.J. and Scalia, J.). The dissenters cautioned that "congressional silence should [not] be read as a conferral of preemptive authority," and concluded that sanctioning a practice of deferring to agencies about the scope of their power to preempt would "easily disrupt the federal-state balance." *Id.* at 1584.

This case presents, in its most elemental form, the question left unresolved in *Watters*: Is an agency entitled to deference for its determination that state law is preempted absent a clear and unequivocal delegation of authority from Congress authorizing it to preempt? That question is an urgent one, which has been presented in the lower courts with increasing frequency, and which this Court has not resolved, but should. See, *e.g.*, *State Farm Bank* v. *Reardon*, 539 F.3d 336, 340-341 (6th Cir. 2008) (considering but avoiding question of deference due to Office of Thrift Supervision opinion letter regarding preemption of Ohio banking law); *Fellner* v. *Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 250-251 (3d. Cir. 2008) (refusing to defer to FDA letter finding preemption); *Green Mtn. RR Corp.* v. *Vermont*, 404 F.3d 638, 642 n.2 (2d Cir. 2005) (declining to reach issue of whether deference due to agency preemption determination); *Ass'n of Int'l Auto. Mfgrs.* v. *Comm'r*, 208 F.d 1, 5-6 (1st Cir. 2000) (denying deference to agency's view on statute's preemptive scope); *Massachusetts* v. *U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) (avoiding question "whether an agency's interpretation of a statute on the preemption question is subject to Chevron analysis"); *Colo. Pub. Utils. Comm.* v. *Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) (denying deference to agency's pre-

emption views because "a preemption determination involves matters of law-an area more within the expertise of the courts than within the expertise of the Secretary of Transportation").

2. The district court's second rationale for upholding the Secretary's authority was nothing more than an application of the principle that state laws that conflict with federal law are necessarily preempted. The court reasoned that "even if the Waiver Legislation does not contain explicit preemptive language," state law is still "conflict preempt[ed]" by the Secretary's waivers. App., *infra*, 40a.

It is of course true that agency action can preempt state law without an express grant of preemptive authority where a *court* determines that "compliance with both federal and state regulations is a physical impossibility" *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when a *court* finds that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). See, *e.g.*, *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000) (holding that Department of Transportation safety standards preempted conflicting state tort law); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982) (holding that Federal Home Loan Bank Board's regulation preempted conflicting state law).

Principles of conflict preemption, however, cannot sustain the Secretary's preemption orders. The Secretary declared preempted all state and local laws "of, deriving from, or related to the subject of" each of thirty-seven federal statutes that he had waived. This goes far beyond any concept of conflict preemp-

tion. As this Court has instructed, "[t]o prevail on the claim that the regulations have pre-emptive effect, [the Secretary] must establish more than that they 'touch upon' or *'relate to' that subject matter*." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) (emphasis added) (citing *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-384 (1992)). The Secretary's orders purporting to preempt all state laws "related to" thirty-seven waived federal laws goes far beyond conflict preemption and arrogates to the Secretary a broad power of field preemption never authorized by Congress.

There is a more fundamental flaw with the district court's conflict preemption argument. Even if the district court were correct that the conflict preemption framework is applicable here, "[t]he question remains whether the [Secretary] acted within [his] statutory authority in issuing the pre-emptive [] regulation," *de la Cuesta*, 458 U.S. at 159, as well as whether or not there actually is a conflict. *Id.* at 159 n.14. The Secretary nowhere enumerates which state and local laws are displaced; nor does he explain why all laws "of, deriving from, or related to the subject of" his mandate under the REAL ID Act is synonymous with the set of laws actually *conflicting* with execution of that mandate. Hence it is possible, as the district court speculated, that only those state and local laws that "would directly conflict with Congress's objective of expeditiously constructing a border fence" are preempted by the Secretary's orders. App., *infra*, 40a.

Due to the lack of judicial review, however, only the Secretary is now able to make that limiting construction of his orders. In effect, the district court held that Congress may confide in an agency the authority to determine when state law conflicts with

a federal program *and* to declare any such laws preempted; to do so on an ad hoc, after-the-fact basis; and to make such determinations without any possibility of judicial review.

The district court's decision, coupled with Section 102(c)'s sixty-day statute of limitations, makes the Secretary the sole arbiter of preemption decisions. The statute's preclusion of judicial review, once this narrow window has closed, guarantees that any dispute over which laws fall within the vague bounds of the Secretary's declaration of preemption will be resolved by agency fiat. This Court should grant review to confirm that these questions are inherently judicial, and that no agency is entitled, in the absence of a clear and unequivocal delegation from Congress, to interpret an ambiguous grant of authority to confer upon itself a limitless and unreviewable power to preempt state and local law.

III. The Questions Presented Are Important.

As explained above, the lower courts are in need of guidance with respect to both of the questions presented. Review is warranted for three additional reasons.

First, the legislative process will be more effective and efficient if Congress is able to ascertain in advance the constitutional requirements applicable to delegations of authority to executive agencies. This case gives the Court an opportunity to address two issues that arise frequently: the extent to which Congress must provide for judicial review when it delegates authority to affect private rights, and the specificity with which Congress must act when it wishes to delegate authority to preempt state law.

Second, Congress's elimination of any appeal makes a grant of certiorari all the more pressing.

The elimination of an appeal as of right – either to the courts of appeals or to this Court – sharply distinguishes this statute from the norm in our federal system. Generally, when Congress bypasses the courts of appeals, it provides for a direct appeal to this Court.[3] Here, however, it provided only for discretionary review on certiorari. That approach is virtually unprecedented.[4] Congress's decision to eliminate any appeal of right renders discretionary review by this Court the only means of obtaining a definitive resolution of the serious constitutional questions this case raises.

Indeed, because of the statute's sixty-day statute of limitations, this case presents the last chance for *any* court to ensure that the Secretary's waiver authority conforms to the Constitution. Absent review by this Court, petitioners will be left to the mercy of the Secretary's interpretation of the scope of his delegated authority. He will be the sole arbiter of

---

[3] See, *e.g.*, Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. §§ 901 & 922(b) & (c) (granting that decisions of the district court "shall be reviewable by appeal directly to the Supreme Court of the United States" and creating a "duty" for the district court and the Supreme Court "to advance on the docket and to expedite to the greatest possible extent the disposition" of any case challenging the constitutionality of the Act); Line Item Veto Act of 1996, Pub. L. No 104-130, 110 Stat. 1200 (formerly codified at 2 U.S.C. § 692), invalidated by *Clinton* v. *New York*, 524 U.S. 417 (1998); Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § § 437h note (providing for direct appeal to Supreme Court for constitutional challenges).

[4] The only other example we have located is the Trans-Alaskan Pipeline Authorization Act. See 43 U.S.C. § 1652. But the TAPAA – unlike Section 102(c) – permitted the district court to adjudicate claims that the agency had exceeded its own statutory authority.

whether the waived laws are partially or totally inoperative, whether the hundreds of state and local laws implicated by his ambiguous waiver have been preempted, to what extent, and how long the waivers shall remain in effect. That power is inconsistent with the Nation's traditions, and with our Constitution.

Third, the constitutional questions about the need for judicial review and the scope of the Secretary's power of preemption are important and are fully and fairly presented by the record and decision in this case.

This Court declined to hear an earlier case that arose from a different waiver issued by the Secretary along a different part of the border: *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 128 S.Ct. 2962 (June 23, 2008). In that case, however, the district court's decision did not squarely address the argument that the statute's preclusion of judicial review rendered the delegation unconstitutional, and the Solicitor General asserted that the petitioners had failed to advance in the district court the contention regarding the necessity of judicial review. Br. in Opp. at 14-15, *Defenders of Wildlife* v. *Chertoff*, No. 07-1180 (May 23, 2008). Here, the argument plainly was raised in and addressed by the district court.

The earlier case also did not present a separate question regarding the Secretary's assertion of authority to preempt state and local laws. As the Solicitor General observed, that case "which arose exclusively under three federal statutes" was "an inappropriate vehicle for evaluating the effects of the Secretary's waiver on state and local laws." No. 07-1180 Br. in Opp. at 11 n.5. Here, by contrast, the

preemption issue is squarely presented and was addressed by the district court.

Moreover, the waiver in the earlier case concerned a fourteen-mile stretch of the fence around and in the San Pedro Riparian National Conservation Area (SPRNCA). Construction of that portion of the fence had been completed at the time of the *Defenders* petition. Although the Solicitor General agreed that this did not render the case moot, this fact obviously diminished the practical significance of the question presented. See No. 07-1180, Br. in Opp. at 8 n.3, *Defenders of Wildlife* v. *Chertoff*, No. 07-1180 (May 23, 2008). In contrast, the action below arose from the Secretary's waiver of federal, state, and local laws in an area 470 miles in length, passing through four states. Construction along this segment of the border fence is ongoing. See U.S. Customs and Border Protection, *CBP Offers Landowners Additional Consultation on Border Fence*, http://www.cbp.gov.xp/cgov/newsroom/news_releases/nov_2008/11192008.xml (explaining that construction of the fence is "underway" and is an "ongoing" process).

Finally, we recognize that Congress has directed the Department of Homeland Security to construct a substantial barrier along significant portions of the United States' international border, and has indicated that it regards the expeditious construction of the border fence to be of the highest priority. This legislative judgment is entitled to respect. Unfortunately, in its effort to insure rapid construction of a border fence, Congress delegated to an Executive official unreviewable power to waive "*all* legal requirements," and this power has been exercised by the Secretary in a way that runs roughshod over

fundamental principles of separation of powers and federalism. Section 102(c)(1) (emphasis added).

Petitioners believe, however, that the constitutional infirmities identified in this petition can be rectified without a judgment enjoining further construction of the fence, and without this Court setting aside the waiver authority delegated to the Secretary in Section 102(c). The unconstitutional dimensions of the statute and the orders under review can be set aside and severed from the balance of the statute, leaving the basic mandate from Congress to achieve expeditious construction of the border fence, and the broad authority of the Secretary to waive federal legal requirements that are truly necessary to achieve that objective, unaltered.

The constitutional infirmities challenged by this Petition are two: (1) the statute's preclusion of judicial review to ensure that the Secretary's waiver decisions comply with applicable legal requirements, and (2) the Secretary's declaration that all state and local laws "derived from or related to" thirty-seven federal statutes are preempted. The first infirmity can be cured by enjoining the second sentence of Section 102(c)(1), and by interpreting the phrase "legal requirements" and the sixty-day statute of limitations to provide for judicial review of the Secretary's actions. The second infirmity can be cured by holding that Section 102(c) does not contain the clear and unequivocal delegation of authority which is required to confer authority on an executive agency to preempt state and local law. Once these errors are corrected, the balance of the statutory scheme, and the Secretary's orders implementing it, can function effectively and constitutionally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
ELIZABETH G. OYER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

DECEMBER 2008

APPENDICES

APPENDIX A

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended

April 8, 2008

AGENCY: Office of the Secretary, Department of Homeland Security.

ACTION: Notice of determination; correction.

SUMMARY: The Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border of the United States. The notice of determination was published in the **Federal Register** on April 3, 2008. Due to a publication error, the Project Area description was inadvertently omitted from the April 3 publication. For clarification purposes, this document is a republication of the April 3 document including the omitted Project Area description.

DATES: This Notice is effective on April 8, 2008.

Determination and Waiver

The Department of Homeland Security has a mandate to achieve and maintain operational control

of the borders of the United States. Public Law 109-367, 2, 120 Stat. 2638, 8 U.S.C. 1701 note. Congress has provided the Secretary of Homeland Security with a number of authorities necessary to accomplish this mandate. One of these authorities is found at section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Public Law 104-208, Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C 1103 note), as amended by the REAL ID Act of 2005, Public Law 109-13, Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 note), as amended by the Secure Fence Act of 2006, Public Law 109-367, 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, Div. E, Title V, 564, 121 Stat. 2090 (Dec. 26, 2007). In Section 102(a) of the IIRIRA, Congress provided that the Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. In Section 102(b) of the IIRIRA, Congress has called for the installation of fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwest border, including priority miles of fencing that must be completed by December of 2008. Finally, in section 102(c) of the IIRIRA, Congress granted to me the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of the IIRIRA.

I determine that the following area of Hidalgo County, Texas, in the vicinity of the United States border, hereinafter the Project Area, is an area of high illegal entry:

• Starting approximately at the intersection of Military Road and an un-named road (i.e. beginning at the western end of the International Boundary Waters Commission (IBWC) levee in Hidalgo County) and runs east in proximity to the IBWC levee for approximately 4.5 miles.

• Starting approximately at the intersection of Levee Road and 5494 Wing Road and runs east in proximity to the IBWC levee for approximately 1.8 miles.

• Starting approximately 0.2 mile north from the intersection of S. Depot Road and 23rd Street and runs south in proximity to the IBWC levee to the Hidalgo POE and then east in proximity to the new proposed IBWC levee and the existing IBWC levee to approximately South 15th Street for a total length of approximately 4.0 miles.

• Starting adjacent to Levee Road and approximately 0.1 miles east of the intersection of Levee Road and Valley View Road and runs east in proximity to the IBWC levee for approximately 1.0 mile then crosses the Irrigation District Hidalgo County #1 Canal and will tie into the future New Donna POE fence.

• Starting approximately 0.1 mile east of the intersection of County Road 556 and County Road 1554 and runs east in proximity to the IBWC levee for approximately 3.4 miles.

• Starting approximately 0.1 mile east of the Bensten Groves road and runs east in proximity to

the IBWC levee to the Progresso POE for approximately 3.4 miles.

• Starting approximately at the Progresso POE and runs east in proximity to the IBWC levee for approximately 2.5 miles.

In order to deter illegal crossings in the Project Area, there is presently a need to construct fixed and mobile barriers and roads in conjunction with improvements to an existing levee system in the vicinity of the border of the United States as a joint effort with Hidalgo County, Texas. In order to ensure the expeditious construction of the barriers and roads that Congress prescribed in the IIRIRA in the Project Area, which is an area of high illegal entry into the United States, I have determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of the IIRIRA as amended. Accordingly, I hereby waive in their entirety, with respect to the construction of roads and fixed and mobile barriers (including, but not limited to, accessing the project area, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of fences, roads, supporting elements, drainage, erosion controls, safety features, surveillance, communication, and detection equipment of all types, radar and radio towers, and lighting) in the Project Area, all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of, the following laws, as amended: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884) (Dec. 28, 1973) (16 U.S.C. 1531 *et seq.*)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (33 U.S.C. 1251 *et seq.*), the Na-

tional Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966) (16 U.S.C. 470 *et seq.*)), the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*), the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Archeological Resources Protection Act (Pub. L. 96-95, 16 U.S.C. 470aa *et seq.*), the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), the Noise Control Act (42 U.S.C. 4901 *et seq.*), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), the Archaeological and Historic Preservation Act (Pub. L. 86-523, 16 U.S.C. 469 *et seq.*), the Antiquities Act (16 U.S.C. 431 *et seq.*), the Historic Sites, Buildings, and Antiquities Act (16 U.S.C. 461 *et seq.*), the Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*), the Coastal Zone Management Act (Pub. L. 92-583, 16 U.S.C. 1451 *et seq.*), the Federal Land Policy and Management Act (Pub L. 94-579, 43 U.S.C. 1701 *et seq.*), the National Wildlife Refuge System Administration Act (Pub. L. 89-669, 16 U.S.C. 668dd-668ee), the Fish and Wildlife Act of 1956 (Pub. L. 84-1024, 16 U.S.C. 742a, *et seq.*), the Fish and Wildlife Coordination Act (Pub. L. 73-121, 16 U.S.C. 661 *et seq.*), the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Eagle Protection Act (16 U.S.C. 668 *et seq.*), the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*); the American Indian Religious Freedom Act (42 U.S.C. 1996), the Religious Freedom Restoration Act (42 U.S.C. 2000bb), and the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6303-05).

I reserve the authority to make further waivers from time to time as I may determine to be necessary

to accomplish the provisions of section 102 of the IIRIRA, as amended.

Michael Chertoff,
Secretary.

APPENDIX B

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended

April 8, 2008

AGENCY: Office of the Secretary, Department of Homeland Security.

ACTION: Notice of determination; correction.

SUMMARY: The Secretary of Homeland Security has determined, pursuant to law, that it is necessary to waive certain laws, regulations and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border of the United States. The notice of determination was published in the Federal Register on April 3, 2008. Due to a publication error, the description of the Project Areas was inadvertently omitted from the April 3 publication. For clarification purposes, this document is a republication of the April 3 document including the omitted description of the Project Areas.

DATES: This Notice is effective on April 8, 2008.

Determination and Waiver

I have a mandate to achieve and maintain operational control of the borders of the United States.

Public Law 109-367, 2, 120 Stat. 2638, 8 U.S.C. 1701 note. Congress has provided me with a number of authorities necessary to accomplish this mandate. One of these authorities is found at section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Public Law 104-208, Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C 1103 note), as amended by the REAL ID Act of 2005, Public Law 109-13, Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 note), as amended by the Secure Fence Act of 2006, Public Law 109-367, 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, Div. E, Title V, 564, 121 Stat. 2090 (Dec. 26, 2007). In Section 102(a) of IIRIRA, Congress provided that the Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. In Section 102(b) of IIRIRA, Congress has called for the installation of fencing, barriers, roads, lighting, cameras, and sensors on not less than 700 miles of the southwest border, including priority miles of fencing that must be completed by December 2008. Finally, in section 102(c) of the IIRIRA, Congress granted to me the authority to waive all legal requirements that I, in my sole discretion, determine necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA.

I determine that the following areas in the vicinity of the United States border, located in the States of California, Arizona, New Mexico, and Texas are

areas of high illegal entry (collectively "Project Areas"):

California

• Starting approximately 1.5 mile east of Border Monument (BM) 251 and ends approximately at BM 250.

• Starting approximately 1.1 miles west of BM 245 and runs east for approximately 0.8 mile.

• Starting approximately 0.2 mile west of BM 243 and runs east along the border for approximately 0.5 mile.

• Starting approximately 0.7 mile east of BM 243 and runs east along the border for approximately 0.9 mile.

• Starting approximately 1.0 mile east of BM 243 and runs east along the border for approximately 0.9 mile.

• Starting approximately 0.7 mile west of BM 242 and stops approximately 0.4 mile west of BM 242.

• Starting approximately 0.8 mile east of BM 242 and runs east along the border for approximately 1.1 miles.

• Starting approximately 0.4 mile east of BM 239 and runs east for approximately 0.4 mile along the border.

• Starting approximately 1.2 miles east of BM 239 and runs east for approximately 0.2 mile along the border.

• Starting approximately 0.5 mile west of BM 235 and runs east along the border for approximately 1.1 miles.

• Starting approximately 0.8 mile east of BM 235 and runs east along the border for approximately 0.1 mile.

• Starting approximately 0.6 mile east of BM 234 and runs east for approximately 1.7 miles along the border.

• Starting approximately 0.4 mile east of BM 233 and runs east for approximately 2.1 miles along the border.

• Starting approximately 0.05 mile west of BM 232 and runs east for approximately 0.1 mile along the border.

• Starting approximately 0.2 mile east of BM 232 and runs east for approximately 1.5 miles along the border.

• Starting 0.6 mile east of Border Monument 229 heading east along the border for approximately 11.3 miles to BM 225.

• Starting approximately 0.1 mile east of BM 224 and runs east along the border for approximately 2.5 miles.

• Starting approximately 2.3 miles east of BM 220 and runs east along the border to BM 207.

Arizona

• Starting approximately 1.0 mile south of BM 206 and runs south along the Colorado River for approximately 13.3 miles.

• Starting approximately 0.1 mile north of County 18th Street running south along the border for approximately 3.8 miles.

• Starting at the Eastern edge of BMGR and runs east along the border to approximately 1.3 miles west of BM 174.

• Starting approximately 0.5 mile west of BM 168 and runs east along the border for approximately 5.3 miles.

• Starting approximately 1 mile east of BM 160 and runs east for approximately 1.6 miles.

• Starting approximately 1.3 miles east of BM 159 and runs east along the border to approximately 0.3 mile east of BM 140.

• Starting approximately 2.2 miles west of BM 138 and runs east along the border for approximately 2.5 miles.

• Starting approximately 0.2 miles east of BM 136 and runs east along the border to approximately 0.2 mile west of BM 102.

• Starting approximately 3 miles west of BM 99 and runs east along the border approximately 6.5 miles.

• Starting approximately at BM 97 and runs east along the border approximately 6.9 miles.

• Starting approximately at BM 91 and runs east along the border to approximately 0.7 miles east of BM 89.

• Starting approximately 1.7 miles west of BM 86 and runs east along the border to approximately 0.7 mile west of BM 86.

• Starting approximately 0.2 mile west of BM 83 and runs east along the border to approximately 0.2 mile east of BM 73.

New Mexico

• Starting approximately 0.8 mile west of BM 69 and runs east along the border to approximately 1.5 miles west of BM 65.

• Starting approximately 2.3 miles east of BM 65 and runs east along the border for approximately 6.0 miles.

• Starting approximately 0.5 mile east of BM 61 and runs east along the border until approximately 1.0 mile west of BM 59.

• Starting approximately 0.1 miles east of BM 39 and runs east along the border to approximately 0.3 mile east of BM 33.

• Starting approximately 0.25 mile east of BM 31 and runs east along the border for approximately 14.2 miles.

• Starting approximately at BM 22 and runs east along the border to approximately 1.0 mile west BM 16.

• Starting at approximately 1.0 mile west of BM 16 and runs east along the border to approximately BM 3.

Texas

• Starting approximately 0.4 miles southeast of BM 1 and runs southeast along the border for approximately 3.0 miles.

• Starting approximately 1 Mi E of the intersection of Interstate 54 and Border Highway and runs southeast approximately 57 miles in proximity to the IBWC levee to 3.7 miles east of the Ft Hancock POE.

• Starting approximately 1.6 miles west of the intersection of Esperanza and Quitman Pass Roads

and runs along the IBWC levee east for approximately 4.6 miles.

• Starting at the Presidio POE and runs west along the border to approximately 3.2 miles west of the POE.

• Starting at the Presidio POE and runs east along the border to approximately 3.4 miles east of the POE.

• Starting approximately 1.8 miles west of Del Rio POE and runs east along the border for approximately 2.5 miles.

• Starting approximately 1.3 Mi north of the Eagle Pass POE and runs south approximately 0.8 miles south of the POE.

• Starting approximately 2.1 miles west of Roma POE and runs east approximately 1.8 miles east of the Roma POE.

• Starting approximately 3.5 miles west of Rio Grande City POE and runs east in proximity to the Rio Grande river for approximately 9 miles.

• Starting approximately 0.9 miles west of County Road 41 and runs east approximately 1.2 miles and then north for approximately 0.8 miles.

• Starting approximately 0.5 mile west of the end of River Dr and runs east in proximity to the IBWC levee for approximately 2.5 miles.

• Starting approximately 0.6 miles east of the intersection of Benson Rd and Cannon Rd and runs east in proximity to the IBWC levee for approximately 1 mile.

• Starting at the Los Indios POE and runs west in proximity to the IBWC levee for approximately 1.7 miles.

• Starting at the Los Indios POE and runs east in proximity to the IBWC levee for approximately 3.6 miles.

• Starting approximately 0.5 mile west of Main St and J Padilla St intersection and runs east in proximity to the IBWC levee for approximately 2.0 miles.

• Starting approximately 1.2 miles west of the Intersection of U.S. HWY 281 and Los Ranchitos Rd and runs east in proximity to the IBWC levee for approximately 2.4 miles.

• Starting approx 0.5 miles southwest of the intersection of U.S. 281 and San Pedro Rd and runs east in proximity to the IBWC levee for approximately 1.8 miles.

• Starting approximately 0.1 miles southwest of the Intersection of Villanueva St and Torres Rd and runs east in proximity to the IBWC levee for approximately 3.6 miles.

• Starting approximately south of Palm Blvd and runs east in proximity to the City of Brownsville's levee to approximately the Gateway-Brownsville POE where it continues south and then east in proximity to the IBWC levee for a total length of approximately 3.5 miles.

• Starting at the North Eastern Edge of Ft Brown Golf Course and runs east in proximity to the IBWC levee for approximately 1 mile.

• Starting approximately 0.3 miles east of Los Tomates-Brownsville POE and runs east and then north in proximity to the IBWC levee for approximately 13 miles.

In order to deter illegal crossings in the Project Areas, there is presently a need to construct fixed

and mobile barriers (such as fencing, vehicle barriers, towers, sensors, cameras, and other surveillance, communication, and detection equipment) and roads in the vicinity of the border of the United States. In order to ensure the expeditious construction of the barriers and roads that Congress prescribed in the IIRIRA in the Project Areas, which are areas of high illegal entry into the United States, I have determined that it is necessary that I exercise the authority that is vested in me by section 102(c) of the IIRIRA as amended.

Accordingly, I hereby waive in their entirety, with respect to the construction of roads and fixed and mobile barriers (including, but not limited to, accessing the project area, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of fences, roads, supporting elements, drainage, erosion controls, safety features, surveillance, communication, and detection equipment of all types, radar and radio towers, and lighting) in the Project Areas, all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of, the following laws, as amended: The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 *et seq.*)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (33 U.S.C. 1251 *et seq.*)), the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966) (16 U.S.C. 470 *et seq.*)), the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*), the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Archeological Resources Protection Act (Pub. L. 96-95, 16 U.S.C. 470aa *et seq.*), the Safe Drinking Water Act

(42 U.S.C. 300f *et seq.*), the Noise Control Act (42 U.S.C. 4901 *et seq.*), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), the Archaeological and Historic Preservation Act (Pub. L. 86-523, 16 U.S.C. 469 *et seq.*), the Antiquities Act (16 U.S.C. 431 *et seq.*), the Historic Sites, Buildings, and Antiquities Act (16 U.S.C. 461 *et seq.*), the Wild and Scenic Rivers Act (Pub. L. 90-542, 16 U.S.C. 1281 *et seq.*), the Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*), the Coastal Zone Management Act (Pub. L. 92-583, 16 U.S.C. 1451 *et seq.*), the Wilderness Act (Pub. L. 88-577, 16 U.S.C. 1131 *et seq.*), the Federal Land Policy and Management Act (Pub L. 94-579, 43 U.S.C. 1701 *et seq.*), the National Wildlife Refuge System Administration Act (Pub. L. 89-669, 16 U.S.C. 668dd-668ee), the Fish and Wildlife Act of 1956 (Pub. L. 84-1024, 16 U.S.C. 742a, *et seq.*), the Fish and Wildlife Coordination Act (Pub. L. 73-121, 16 U.S.C. 661 *et seq.*), the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Otay Mountain Wilderness Act of 1999 (Pub. L. 106-145), Sections 102(29) and 103 of Title I of the California Desert Protection Act (Pub. L. 103-433), 50 Stat. 1827, the National Park Service Organic Act (Pub. L. 64-235, 16 U.S.C. 1, 2-4), the National Park Service General Authorities Act (Pub. L. 91-383, 16 U.S.C. 1a-1 *et seq.*), Sections 401(7), 403, and 404 of the National Parks and Recreation Act of 1978 (Pub. L. 95-625), Sections 301(a)-(f) of the Arizona Desert Wilderness Act (Pub. L. 101-628), the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Eagle Protection Act (16 U.S.C. 668 *et seq.*), the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*),

the American Indian Religious Freedom Act (42 U.S.C. 1996), the Religious Freedom Restoration Act (42 U.S.C. 2000bb), the National Forest Management Act of 1976 (16 U.S.C. 1600 *et seq.*), and the Multiple Use and Sustained Yield Act of 1960 (16 U.S.C. 528-531).

This waiver does not supersede, supplement, or in any way modify the previous waivers published in the Federal Register on September 22, 2005 (70 FR 55622), January 19, 2007 (72 FR 2535), and October 26, 2007 (72 FR 60870).

I reserve the authority to make further waivers from time to time as I may determine to be necessary to accomplish the provisions of section 102 of the IIRIRA, as amended.

Michael Chertoff,

Secretary.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION

COUNTY OF EL PASO, *et al.*,
Plaintiffs,

v.

MICHAEL CHERTOFF, Secretary, U.S. Department of Homeland Security, and U.S. DEPARTMENT OF HOMELAND SECURITY,
Defendants.

EP-08-CA-196-FM

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION

On this day, the Court considered County of El Paso, City of El Paso, El Paso County Water Improvement District No. 1 (the "Water District"), Hudspeth County Conservation and Reclamation District No. 1, Ysleta Del Sur Pueblo, Frontera Audubon Society, Friends of the Wildlife Corridor, Friends of Laguna Atascosa National Wildlife Refuge, and Mark Clark's (collectively, "Plaintiffs") "Application for Preliminary Injunction" ("Application") [Rec. No. 19], filed on June 23, 2008, in the above-captioned cause. In their Application, Plaintiffs request the Court to enter a preliminary injunction to prevent Michael

Michael Chertoff, Secretary of the Department of Homeland Security ("Chertoff" or "Secretary") and the Department of Homeland Security ("DHS") (collectively, "Defendants") from constructing any fencing, walls, or other physical barriers along the United States-Mexico border in Texas, New Mexico, Arizona, and California, unless and until DHS complies with the laws waived by Chertoff on April 3, 2008. After carefully considering the parties' briefs, arguments, and applicable law, the Court concludes it should deny Plaintiffs' Application.

I. BACKGROUND

A. Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") Section 102

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which, pursuant to Section 102(a), required the Attorney General to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States."[1] IIRIRA Section 102(c), as originally enacted, authorized the Attorney General to waive the Endangered Species Act of 1973 ("ESA") and the National Environmental Policy Act of 1969 ("NEPA") when he determined such waiver "was necessary to ensure expeditious construction of the barriers and roads under this section."[2] The Homeland Security Act of

---

[1] Pub. L. No. 104-208, § 102(a), 110 Stat. 3009, 3009-554 (1996), codified at 8 U.S.C. § 1103 note.

[2] *Id.* § 102(c).

2002 abolished the Immigration and Naturalization Service and transferred responsibility for the construction of border barriers from the Attorney General to DHS.[3] In 2005, pursuant to the REAL ID Act, Congress amended Section 102(c) and gave the Secretary, "notwithstanding any other provision of law . . . the authority to waive all legal requirements such Secretary . . . determines necessary to ensure expeditious construction of the barriers and roads under this section" ("Waiver Legislation").[4] Section 102, as amended, only permits claims alleging a constitutional violation,[5] and any "interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States."[6]

B. Factual and Procedural History

On April 3, 2008, Chertoff exercised his authority, pursuant to Section 102, and published two notices in the Federal Register waiving various federal, state, and local laws to facilitate construction of physical barriers and roads along the United States-Mexican border. Specifically, Chertoff waived twenty-seven laws to facilitate construction of barriers and roads along twenty-two miles of the Texas-

---

[3] Pub. L. No. 107-296, 116 Stat. 2135.

[4] Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 231, 306 (2005), codified at 8 U.S.C. § 1103 note ("REAL ID Act"). The Secretary's waiver becomes effective upon publication in the Federal Register. *Id.*

[5] *Id.* § 102(c)(2)(A).

[6] *Id.* § 102(c)(2)(C).

Mexico border in Hidalgo County, Texas.[7] Chertoff also waived thirty-seven laws to facilitate construction of barriers and roads along 470 miles of the United States-Mexico border in Texas, New Mexico, Arizona, and California.[8]

On June 2, 2008, Plaintiffs filed their "Complaint for Declaratory and Injunctive Relief" ("Complaint") [Rec. No. 1]. In their Complaint, Plaintiffs raise three constitutional challenges to the Waiver Legislation: (1) a Nondelegation challenge pursuant to Article I, Section 1, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Constitution, and (3) a federalism challenge pursuant to the Constitution's Tenth Amendment. On June 23, 2008, Plaintiffs filed their Application for Preliminary Injunction. On June 24, 2008, Defendants responded by filing their "Memorandum of Points and Authorities in Opposition to Plaintiffs' Application for Preliminary Injunction and in Support of Defendants' Motion to Dismiss" ("Response") [Rec. No. 21]. On July 8, 2008, Plaintiffs filed their "Reply Brief in Support of Plaintiffs' Application for Preliminary Injunction and Brief Opposing Defendants' Motion to Dismiss" [Rec. No. 23]." Defendants' Reply Memorandum in Support of Defendants' Motion to Dismiss" [Rec. No. 26] followed on July 21, 2008.

---

[7] *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19077 (Apr. 8, 2008) ("Hidalgo County Waiver").

[8] *Id.* at 73 Fed. Reg. 19078 (Apr. 8, 2008) ("Multi-state Waiver").

II. APPLICABLE LAW

"A preliminary injunction 'is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries a burden of persuasion.'"[9] The purpose of a preliminary injunction is to preserve the parties' relative positions until a court is able to adjudicate the merits of their respective grievances.[10]

To obtain a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood the plaintiff will prevail on the merits; (2) a substantial threat the plaintiff will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to the plaintiff outweighs the threatened injury to the defendant; and (4) granting the preliminary injunction will not adversely affect the public interest.[11]

III. ANALYSIS

A. Factor One: Substantial Likelihood Plaintiffs Will Prevail on the Merits

In their Application, Plaintiffs raise three constitutional challenges to the Waiver Legislation: (1) a Nondelegation challenge pursuant to Article I, Section 1, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Con-

---

[9] *Black Fire Fighters Ass'n v. Dallas*, 905 F.2d 63, 65 (5th Cir. 1990) (citing *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)).

[10] *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

[11] *Harris County v. CarMax Auto Superstores*, 177 F.3d 306, 312 (5th Cir.1999).

stitution, and (3) a Federalism challenge pursuant to the Constitution's Tenth Amendment.

(1) Plaintiffs' Nondelegation Challenge

(a) Applicable Law

Article I, Section 1, of the Constitution provides "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[12] "From this language the [Supreme] Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government."[13] The Nondelegation Doctrine requires Congress to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[14] To satisfy the intelligible principle standard, courts apply a three prong test and deem a statute to be constitutional only "if Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority."[15]

In 1935, the Supreme Court invalidated two federal statutes because they lacked an intelligible principle to guide the respective agencies.[16] Since 1935,

---

[12] U.S. CONST. art. I, § 1.

[13] *Touby v. United States*, 500 U.S. 160, 165 (1991).

[14] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

[15] *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

[16] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

however, the Supreme Court has "upheld . . . without deviation, Congress'[s] ability to delegate power under broad standards."[17] The Supreme Court has stated "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,"[18] but if the delegation is in an area where the Executive Branch maintains traditional authority, Congress may delegate in even broader terms.[19]

(b) Discussion

(i) Boundaries of Delegated Authority (3rd Prong)

First, Plaintiffs argue the Waiver Legislation unconstitutionally delegates legislative power to DHS. No one disputes Congress has successfully "articulated a general policy (construction of a border fence) [Prong 1] and an agency actor (the Secretary of Homeland Security) [Prong 2]"[20] to satisfy the first two prongs of the intelligible principle standard. However, Plaintiffs contend Congress has "utterly failed to prescribe the requisite boundaries of the delegated authority [Prong 3]."[21] Plaintiffs maintain when Congress broadly delegates its powers, "more detailed guidance is necessary to ensure that discretion is exercised only in ways that effectuate Congress's expressed legislative intent. Where, as here, the delegated authority is exceptionally broad . . . the intelligible principle standard cannot be satisfied by

---

[17] *Mistretta*, 488 U.S. at 373.

[18] *Whitman*, 531 U.S. at 475.

[19] *Loving v. United States*, 517 U.S. 748, 772 (1996).

[20] Pls.' Application at 6-7.

[21] *Id.*

anything short of 'substantial guidance' from Congress."[22] Plaintiffs compare the current version of Section 102(c) with its prior version (under which the Attorney General could only waive NEPA and ESA), arguing the current version of Section 102(c) radically differs from the prior version because it permits the Secretary to identify *which* laws can be waived, instead of merely deciding *if* the laws should be waived.[23]

Plaintiffs' nondelegation arguments have been addressed in depth in one or more of the previous district court opinions on this issue.[24] Specifically, in *Sierra Club*, the district court compared both versions of Section 102(c) and found that, even though Congress had expanded the delegation provision to include the waiver of "all laws," it only did so for the "narrow purpose of expeditious completion" of the construction authorized by the Waiver Legislation.[25] The district court found Congress had laid down an intelligible principle in the Waiver Legislation be-

---

[22] Pls.' Application at 7.

[23] *Id.* at 5.

[24] *See Sierra Club v. Ashcroft*, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005), *no petition for cert. filed*[] (addressing the constitutionality of the Secretary's waiver authority and holding the delegation of authority was constitutional); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 2008 WL 728197, 76 U.S.L.W. 3512 (June 23, 2008) (holding the Secretary's waiver authority, pursuant to Section 102, is a constitutional delegation of authority); *Save Our Heritage Organization v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008), *no petition for cert. filed* (adopting the *Sierra Club* district court's analysis and holding the Secretary's waiver power, pursuant to Section 102, is constitutional).

[25] 2005 U.S. Dist. LEXIS 44244 at *20.

cause "improvement of U.S. border protection is the 'clearly delineated general policy,' required for a proper delegation, and [] Congress adequately circumscribed the actions permitted to be taken as those 'necessary to install additional physical barriers and roads.'"[26] The district court also found the "necessity" standard provided in the Waiver Legislation was constitutional.[27] Finally, the district court found because "the delegation of authority in this instance implicates immigration enforcement and national security – matters in which the Executive Branch already exercises considerable independent authority, the delegation was appropriate."[28]

In *Defenders of Wildlife,* the district court applied the same reasoning as the *Sierra Club* court and held the waiver provision did not constitute an impermissible legislative delegation.[29] The district court held Section 102

> meets the requirements of the Supreme Court's nondelegation cases.

---

[26] *Id.*

[27] *Id.* at *21. The district court compared the Waiver Legislation's necessity standard to the standard found in *Whitman,* in which the Supreme Court held a delegation to the Environmental Protection Agency to "set air quality standards at the level that is 'requisite,' that is, not lower or higher than is necessary – to protect public health," was constitutional. *Id.* (quoting *Whitman*, 531 U.S. at 474-76).

[28] Id. at *23. The district court noted the Supreme Court's holding that immigration policy falls within the inherent executive powers. *See Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.").

[29] *Defenders of Wildlife*, 527 F. Supp. 2d at 127.

> The "general policy" is "clearly delineated" – i.e. to expeditiously "install additional physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry."And, the "boundaries" of the delegated authority are clearly defined by Congress's requirement that the Secretary may waive only those laws that he determines "necessary to ensure expeditious construction."[30]

Moreover, in response to plaintiffs' arguments that the Secretary's scope of authority was exceptionally broad, the district court observed "there is no legal authority or principled basis upon which a court may strike down an otherwise permissible delegation simply because of its broad scope."[31] The district court noted that "[w]hen the area to which the legislation pertains is one where the Executive Branch already has significant independent constitutional authority, delegations may be broader than in other contexts."[32] In *Save Our Heritage Organization,* the district court agreed with the *Defenders of Wildlife* court's analysis and held it found "no constitutional impediment to the Secretary's waivers because there is an intelligible principle [to which] the

---

[30] *Id.* (quoting *Mistretta*, 488 U.S. at 372-73; 8 U.S.C. § 1103 note).

[31] *Id.* at 128; *see also Loving*, 517 U.S. at 771 ("[W]e have since [1935] upheld, without exception, delegations under standards phrased in sweeping terms.").

[32] *Id.* at 129 (quoting *Sierra Club*, 2005 U.S. Dist. LEXIS at *17 (citing *Loving*, 517 U.S. at 772)).

Secretary must conform [] in the exercise of his delegated power."[33]

After carefully considering the relevant law, the Court concludes the Waiver Legislation clearly satisfies the intelligible principle standard. In light of the *Sierra Club, Defenders of Wildlife,* and *Save Our Heritage Organization* courts' well-analyzed decisions on this issue, the Court finds Congress constitutionally delegated its authority in the Waiver Legislation because it provided the Secretary with an intelligible principle to guide his discretionary waiver of legal requirements to expeditiously complete construction of physical barriers and roads at the nation's borders.

(ii) Lack of Judicial Review

Second, Plaintiffs argue the Waiver Legislation is unconstitutional because the Secretary's authority is "not constrained by judicial review."[34] Plaintiffs argue a constitutional delegation of legislative authority requires an intelligible principle *and* judicial review. Plaintiffs claim "[w]henever Congress has delegated broad authority to the Executive branch, the Supreme Court has found the presence of judicial review essential to satisfy the intelligible principle standard."[35] They contend "the [Supreme] Court has dispensed with the requirement of judicial review *only* in the limited category of cases in which delegated authority falls squarely within the inde-

[33] *Save Our Heritage Organization*, 533 F. Supp. 2d at 63-64.

[34] Pls.' Application at 9.

[35] *Id.* at 10.

pendent authority of the Executive Branch and thus does not require an 'intelligible principle.'"[36]

Plaintiffs cite the Supreme Court cases of *Yakus v. United States*[37] and *American Power & Light Co. v. SEC*[38] for the principle that judicial review is required in the context of the intelligible principle analysis.[39] In *Yakus*, the Supreme Court upheld the Emergency Price Control Act ("EPCA") against a nondelegation challenge because it determined Congress had provided constitutionally-adequate standards to guide the Price Administrator's fixing of price controls.[40] The Supreme Court stated:

> Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be *impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed,* would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation. The standards prescribed by the present Act [EPCA], with the aid of the 'statement of the considerations' required to be made by the Administrator, are sufficiently definite and

---

[36] *Id.* at 11 (emphasis added).

[37] 321 U.S. 414 (1944).

[38] 329 U.S. 90 (1946).

[39] Plaintiffs also cite to other Supreme Court cases which cite back to *Yakus* and *American Power* for the same principle. *See, e.g., Touby*, 500 U.S. at 168-69; *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989)[;] *Mistretta*, 488 U.S. at 379.

[40] 321 U.S. at 426.

> precise to enable *Congress, the courts and the public* to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards.[41]

In *American Power*, the Supreme Court upheld the Public Utility Holding Company Act of 1935 ("PUHCA") against a nondelegation challenge because it found the statute provided constitutionally-adequate guidance.[42] The Supreme Court stated:

> Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. Such is the situation here.[43]

After carefully considering Plaintiffs' argument, the Court finds the Supreme Court does not require judicial review to satisfy the intelligible principle standard. In *Whitman*, the Supreme Court held a constitutionally permissible delegation only required Congress to provide an intelligible principle to guide the exercise of delegated authority.[44] The Supreme

---

[41] *Id.* (emphasis added).

[42] 329 U.S. at 104-06.

[43] *Id.* at 105.

[44] 531 U.S. at 472.

Court first announced this clearly in *J.W. Hampton, Jr. & Co.*, when it declared "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[45]

Moreover, Plaintiffs' argument that *Yakus* and *American Power* stand for the proposition that judicial review is required to satisfy the intelligible principle standard is unavailing. In *Yakus*, the Supreme Court discussed how Congress had provided adequate standards in the EPCA long before the Supreme Court even mentioned judicial review. The excerpt from *Yakus*[46] above could also be read to simply imply the Supreme Court understands the need to facilitate accountability generally. In that portion of the *Yakus* opinion, the Supreme Court merely mentions review by Congress, the courts and the public, rather than mandating a necessary framework for judicial review. Moreover, in *American Power*, the plaintiff did not directly challenge PUHCA on the grounds it lacked judicial review. The plaintiff instead challenged PUHCA because certain statutory terms were not defined and allegedly gave the commission unfettered discretion in its decisions.[47]

---

[45] 276 U.S. at 409.

[46] "The standards prescribed by the present Act [EPCA], with the aid of the 'statement of the considerations' required to be made by the Administrator, are sufficiently definite and precise to enable *Congress, the courts and the public* to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards." *Yakus*, 321 U.S. at 426 (emphasis added).

[47] *American Power*, 329 U.S. at 104.

In light of the fact that (1) Plaintiffs have not presented any cases in which the Supreme Court struck down a statute explicitly for lack of judicial review in the intelligible principle analysis, (2) the Supreme Court denied certiorari in *Defenders of Wildlife* where the plaintiffs' main arguments asserted judicial review was required in the intelligible principle standard analysis, (3) other courts have held the Supreme Court does not require judicial review in the intelligible principle analysis,[48] and (4) the Waiver Legislation does not preclude judicial review entirely because parties can petition for certiorari to the Supreme Court,[49] the Court concludes

---

[48] In *United States v. Bozarov*, the Ninth Circuit considered whether judicial review was required to satisfy the intelligible principle standard and held preclusion of judicial review in the Export Administration Act did not violate the Nondelegation Doctrine. 974 F.2d 1037 (9th Cir.1992), *cert. denied*, 507 U.S. 917 (Feb. 22, 1993). Bozarov argued the "purpose of requiring an intelligible principle is to permit a court to ascertain whether the will of Congress has been obeyed." *Id.* at. 1041. However, the Ninth Circuit panel agreed with the Government's argument that "the purpose of an intelligible principle is simply to channel the discretion of the executive and to permit Congress to determine whether its will is being obeyed." *Id.* The panel analyzed the *Yakus*, *American Power*, and *Touby* decisions and stated that, while the cases suggested the availability of judicial review was a factor to consider, the Supreme Court did not hold judicial review was always constitutionally required. *Id.* at 1042. *See also United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir.1994) (suggesting the existence of judicial review is a factor to be considered in determining whether Congress has unconstitutionally delegated its legislative authority).

[49] Section 102, as amended, provides any "interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States." REAL ID Act, Pub. L. No. 109-13,

Plaintiffs' argument requiring the need for judicial review of the scope of the Secretary's waivers fails.

(2) Plaintiffs' Presentment Clause Challenge

(a) Applicable Law

Article I of the Constitution provides any federal statute must pass both houses of Congress, and "before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it."[50] "Amendment and repeal of statutes, no less than enactment, must conform with" the presentment and bicameralism requirements of Article I.[51]

In *Clinton v. City of New York*,[52] the Supreme Court struck down the Line Item Veto Act of 1996 because "[i]n both legal and practical effect," it authorized the President to amend "Acts of Congress by repealing a portion of each."[53] The Line Item Veto Act gave the President the power to cancel items of spending which had been previously signed into law.[54] Upon cancellation by the President, these items no longer had any "legal force or effect" what-

---

§ 102(c)(2)(A), 119 Stat. 231, 306 (2005), codified at 8 U.S.C. § 1103 note.

[50] U.S. CONST. art. I, § 7 ("Presentment Clause").

[51] *INS v. Chadha*, 462 U.S. 919, 954 (1983).

[52] 524 U.S. 417 (1998).

[53] *Id.* at 438.

[54] *Id.* 436.

soever.[55] The Supreme Court observed the laws resulting from the President's statutory cancellation powers produced "truncated versions of two bills that passed both Houses of Congress"[56] and held the Constitution does not authorize the President "to enact, to amend, or to repeal statutes."[57]

(b) Discussion

Plaintiffs argue the Waiver Legislation violates the Presentment Clause of the Constitution because it acts as a "partial repeal" of the law, which the Supreme Court found unconstitutional in *Clinton*, when it invalidated the Line Item Veto Act.[58] Plaintiffs contend the Waiver Legislation violates the Presentment Clause because it "amend[s] more than three dozen congressional enactments 'in both legal and practical effect' by rendering them inoperative 'in their entirety' in nearly 500 miles of designated Project Areas."[59] They argue the Waiver Legislation truncates duly enacted laws,[60] a result the Supreme Court held unconstitutional in *Clinton*.

The *Defenders of Wildlife* court addressed a similar argument to Plaintiffs' at length, holding "the waiver provision of the REAL ID Act [Waiver Legislation] is not equivalent to the partial repeal or amendment at issue in Clinton."[61] The district court

---

[55] *Id.* at 437 (citation omitted).

[56] *Id.* at 440.

[57] *Id.* at 438.

[58] Pls.' Application at 12.

[59] *Id.* at 13.

[60] *Id.*

[61] *Defenders of Wildlife*, 537 F. Supp. 2d at 124.

observed that in *Clinton*, it was critical to the Supreme Court that the Line Item Veto Act "[gave] the President the unilateral power to change the text of the duly enacted statutes."[62] However, when the Secretary invokes Section 102, the *Defenders of Wildlife* court noted

> [t]he Secretary has no authority to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part. Each of the twenty laws waived by the Secretary . . . retains the same legal force and effect as it had when it was passed by both houses of Congress and presented to the President.[63]

In response to the plaintiffs' argument that the Waiver Legislation constituted a partial repeal because the laws did not apply to the extent they otherwise would have regarding the construction of the border barriers, the *Defenders of Wildlife* court cited to numerous other statutorily-authorized executive waivers, which would also be invalid under this logic, and found *Clinton's* holding could not support this conclusion.[64]

After carefully considering the relevant law and noting Plaintiffs fail to adequately develop their argument, the Court concludes the Waiver Legislation does not violate the Presentment Clause. The Court recognizes the cogent analysis set forth in *Defenders of Wildlife* and concludes that unlike the laws at is-

---

[62] *Id.* (quoting *Clinton*, 524 U.S. at 447).

[63] *Id.*

[64] *Id.* at 124-25.

sue in *Clinton*, which no longer had any "legal force or effect" whatsoever once the President applied the line-item veto, the laws waived pursuant to Section 102 still overwhelmingly remain in effect outside the limited scope of the Secretary's waiver.

(3) Plaintiffs' Tenth Amendment Challenge

(a) Applicable Law

Article VI of the Constitution provides the "Constitution[] and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land."[65] Pursuant to the Supremacy Clause, if there is a conflict between federal law and state or local law, the latter is deemed preempted.[66]

> Pre-emption may be either expressed or implied, and "is compelled whether Congress'[s] command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is ""so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,"" and conflict pre-emption,

---

[65] U.S. CONST. art. VI, cl. 2 ("Supremacy Clause").

[66] *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (deriving preemption from the Supremacy Clause).

> where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[67]

Moreover, "[f]ederal regulations have no less preemptive effect than federal statutes."[68]

In *Gregory v. Ashcroft*,[69] Missouri state court judges challenged a provision of the Missouri state constitution, which set a mandatory retirement age, as violating the federal Age Discrimination in Employment Act of 1967 ("ADEA"). The Supreme Court held a federal law will be applied to important state government activities only if there is a clear statement from Congress that the law was meant to apply.[70] The Supreme Court noted " '[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.' "[71] The Supreme Court explained this rule of statutory construction

---

[67] *Id.* at 98 (citations omitted).

[68] *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

[69] 501 U.S. 452 (1991).

[70] *Id.* at 460-61."If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 460 (citation omitted).

[71] *Id.* at 461 (citation omitted) (internal quotation marks omitted).

should be applied when the statutory language was ambiguous.[72] The Supreme Court found the ADEA lacked such a clear statement and held the statute did not preempt the Missouri mandatory retirement age provision.[73]

In New York v. United States,[74] the Supreme Court invalidated the 1985 Low-Level Radioactive Waste Policy Amendments Act ("the Act") because it violated the Tenth Amendment.[75] The Act created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders.[76] The Act provided monetary incentives to the states to comply with the law and included a "take title" provision, which imposed state liability if the states did not properly dispose of waste within their borders.[77] The Supreme Court held the "take title" provision was unconstitutional because it gave state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress,"[78] both of which were impermissible options for Congress to impose on the states. The Supreme Court held, pursuant to the Tenth Amendment, the federal government may not commandeer state officials "to enact or administer a

---

[72] *Id.* at 470.

[73] *Id.*

[74] 505 U.S. 144 (1992).

[75] The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[76] *New York*, 505 U.S. at 152.

[77] *Id.* at 152-54.

[78] *Id.* at 175.

federal regulatory program."[79] "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress'[s] instructions."[80] The Supreme Court explained if Congress was allowed to commandeer state governments, it would undermine government accountability because Congress could make decisions, but the states would take the political heat and be held responsible for a decision that was not theirs.[81]

(b) Discussion

Plaintiffs argue Section 102(c) does not contain a "clear statement" indicating Congress's intent to preempt state or local law because the section only states the Secretary has authority "to waive all legal requirements."[82] The Supreme Court has stated that courts should apply the clear statement rule only when the statutory language is ambiguous.[83] Here, the language is not ambiguous. Section 102 can be construed as an express preemption clause because Congress expressly gives the Secretary authority, "notwithstanding any other provision of law," to "waive all legal requirements."[84] The Secretary clari-

---

[79] *Id.* at 188.

[80] *Id.* at 162.

[81] *Id.* at 168-69.

[82] Pls.' Application at 18.

[83] *Gregory*, 501 U.S. at 470.

[84] REAL ID Act, Pub. L. No. 109-13, § 102(c)(1), 119 Stat. 231, 306 (2005), codified at 8 U.S.C. § 1103 note.

fies that "all legal requirements" includes "state or other laws, regulations and legal requirements of, deriving from, or related to the subject of" various federal statutes explicitly waived "with respect to the construction of roads and fixed and mobile barriers."[85] Section 102 clearly manifests congressional intent to nullify other laws to the extent necessary to expeditiously construct the border fence.[86]

Moreover, even if the Waiver Legislation does not contain explicit preemptive language, the Supreme Court still recognizes "conflict preemption," where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[87] The Secretary, pursuant to the Supremacy Clause, has only waived state and local laws which interfere with Congress's purpose to construct the border barrier. If Plaintiffs were allowed to enforce state and local laws which impede construction of the border infrastructure, Plaintiffs' actions would directly conflict with Congress's objective of expeditiously constructing a border fence. Therefore, to the extent Plaintiffs' enforcement of state and local laws interfere with meeting the federal objective, the state and local laws are preempted.

Plaintiffs argue the "waivers are so broad and so vague as to state and local laws that they violate basic principles of federalism by placing the govern-

---

[85] *See* Determination Pursuant to Section 102 of the IIRIRA, 73 Fed. Reg. at 19077, 19078.

[86] *See Gade*, 505 U.S. at 96 (noting that whether federal law preempts state law requires an examination of congressional intent).

[87] *Id.* at 98 (citations omitted).

mental Plaintiffs in the intolerable position of not knowing which state and local laws are currently in effect and which may have been indefinitely nullified."[88] The Secretary's waivers set aside all "federal, state or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the various federal statutes explicitly waived and the project.[89] After carefully reviewing the Waiver Legislation, the Court concludes the Secretary's waivers do not affect the validity of the state and local laws. Rather, the waivers merely suspend the effects of the state and local laws. The state and local laws remain operative to the extent they have not been preempted by the Waiver Legislation according to its own terms, i.e., those laws that do not interfere with the expeditious construction of the border fence.

Plaintiffs also argue the Secretary's waivers of state and local laws have "commandeered" state and local governments in violation of the Tenth Amendment. Plaintiffs claim "the waivers relieve the burden of political accountability from congressional lawmakers and place it squarely on the shoulders of local officials who did not in any way participate in the decisionmaking process."[90] Thus, Plaintiffs argue if local officials are unable to perform services for citizens because of the waivers, such as districts delivering water, these officers will nevertheless have to shoulder the blame, even though it was not their idea to waive the state or local laws.[91] Plaintiffs fur-

---

[88] Pls.' Application at 13.

[89] *See* Determination Pursuant to Section 102 of the IIRIRA, 73 Fed. Reg. at 19077, 19078.

[90] Pls.' Application at 17.

[91] *Id.*

ther contend the "costs resulting from the waiver and subsequent construction will be foisted upon the governmental Plaintiffs, forcing them to spend Texas taxpayers' dollars to administer the federal government's construction plan."[92]

Plaintiffs spend two pages alleging the Secretary's waivers "devour[s] the essentials of state sovereignty" by "commandeering" its state and local governments, but Plaintiffs do not provide any support for this conclusion. Unlike the legislation in *New York*, the Waiver Legislation does not require Plaintiffs to enact laws and implement a federal program. The Waiver Legislation merely preempts Plaintiffs from enforcing state and local laws that would impede Congress's ability to expeditiously construct the border fence. Therefore, Plaintiffs' argument they will have to spend extra money to maintain the federal construction plan is without merit because Plaintiffs are not implementing the construction plan, but rather are fulfilling their duty to maintain the Water District's infrastructure. Moreover, although Plaintiffs' argument that local officials will take the blame for decisions they did not make tracks the Supreme Court's explanation in *New York*, it is not a persuasive argument for impeding federal construction of the border barriers, especially because Plaintiffs are not implementing a federal program.

The Waiver Legislation does not violate the Tenth Amendment. Section 102 clearly manifests congressional intent to preempt state and local laws which would interfere with Congress's objective to expeditiously construct the border fence. Moreover,

---

[92] *Id.* at 18.

even if Section 102 does not contain explicit preemptive language, the Waiver Legislation still preempts these laws, pursuant to the Supreme Court's explanation of conflict preemption. Because Plaintiffs' federalism arguments are more rhetorical than substantive, Plaintiffs' argument fails because they have not clearly shown how the Secretary's waivers affects Plaintiffs' sovereignty.

(4) Summary of Plaintiffs' Challenges

Plaintiffs fail to satisfy the first factor for granting a preliminary injunction. Plaintiffs have not established there is a substantial likelihood they will prevail on the merits because Plaintiffs' Nondelegation Clause, Presentment Clause, and Tenth Amendment challenges are unavailing.

B. Factor Two: Substantial Threat Plaintiffs Will Suffer Irreparable Injury if the Injunction is Not Granted

Plaintiffs claim the construction of the border barriers will irreparably injure Plaintiffs and the public. Specifically, Plaintiffs allege the Waiver Legislation will impair the Water District's "ability . . . to deliver water to the City of El Paso and to thousands of farmers throughout the County of El Paso who contract with the [Water] District for their water supply."[93] The Water District maintains the Waiver Legislation will damage its facilities and infrastructure, interfere with canal maintenance, and "generate debris crippling to the [Water] District's

[93] Pls.' Application, Reyes Decl. ¶ 7.

flood control infrastructure."[94] Plaintiffs also argue the construction will affect Ysleta del Sur Pueblo because it will obstruct the tribal community's access to land located by the Rio Grande River, which they use for religious ceremonies.[95] Finally, Plaintiffs argue the construction of the Hidalgo County levee would irreparably damage the Lower Rio Grande Valley's wildlife corridor because it would "create a physical barrier impenetrable to wildlife" and would "threaten the survival of numerous species, including the endangered ocelot and jaguarundi."[96]

Plaintiffs' allegations of harm are conclusory and thus insufficient to establish a concrete or irreparable harm. Plaintiffs allege broad, speculative, and all-encompassing injuries without reasonable specificity. The allegations regarding the harms that would impair the Water District simply consist of conclusory assertions.

The alleged harm to the Ysleta Del Sur Pueblo is reasonably specific. In response, Defendants submit the tribal community will not lose access to the entire Rio Grande River because the construction will not close any of the tribe's current crossing points.[97] Defendants assert current construction plans actually will increase the tribe's access to the Rio Grande River by adding seven additional crossing points.[98]

In response to Plaintiffs' allegations of harm to the wildlife and the environment, Defendants main-

---

[94] *Id.* ¶ 8.

[95] Pls.' Application, Paiz Decl. ¶¶ 3-4.

[96] Pls.' Application, Bartholomew Decl. ¶ 6, 11.

[97] Defs.' Resp., Ahern Decl. ¶ 22.

[98] *Id.*

tain DHS is aware of the potential hazards construction may cause in the Lower Rio Grande Valley and DHS has taken steps to mitigate these hazards. Defendants present three specific mitigation measures which address Plaintiffs' allegations. First, DHS has proposed "installing over 400 'cat holes' that allow for passage of small animals, including the Ocelot and Jaguarundi cats" and "modif[ying] the fence design to create a four inch gap at the bottom of the fence to allow small animals – in particular the Texas horned lizard – passage."[99] Second, DHS is also completing Environmental Stewardship Plans ("ESP"), which provide a comprehensive analysis of the potential environmental impacts associated with the construction of the fence."[100] The ESPs "include the identification and analysis of potential impacts to endangered species . . . and contain appropriate Best Management Practices to avoid or minimize" these potential impacts.[101] Finally, DHS has set aside $24 million to "mitigate impacts to threatened and endangered species, wetlands, and cultural and historic resources."[102]

It is unclear whether DHS's proposed measures, including the amount of allocated federal funds and the implementation of Best Management Practices to avoid or minimize impacts to threatened and endangered species and environmentally sensitive areas, are adequate to mitigate or remedy reasonably anticipated problems which may occur in the construction zone. Nevertheless, Defendants have provided

---

[99] *Id.* ¶ 17.

[100] *Id.* ¶ 16.

[101] *Id.*

[102] *Id.* ¶ 17.

extensive information on measures which address Plaintiffs' concerns. The Court concludes Plaintiffs fail to satisfy the second factor for granting a preliminary injunction. Plaintiffs have not shown there is a substantial threat they will suffer irreparable injury if the Court does not grant a preliminary injunction.

C. Factors Three and Four: Threatened Injury to Plaintiffs Outweighs the Threatened Injury to Defendants and Granting the Preliminary Injunction Will Not Adversely Affect the Public

Because the third and fourth factors for granting a preliminary injunction are closely related, the Court will address both factors in this section. Plaintiffs argue the alleged harms they have presented far outweigh the alleged harms to DHS.[103] Plaintiffs contend the "only conceivable injury that DHS could suffer [from suspending construction pending resolution of this litigation] is some economic cost from altering construction timetables, which would likely be minimal since construction is not yet in progress."[104] Further, while Plaintiffs concede the public has an interest in securing its border, they argue this interest "must be weighed against the interests served by the dozens of federal, state, and local laws that the Secretary would set aside to achieve this goal."[105]

Defendants counter "the injury to DHS in its efforts to enforce the immigration laws, as well as the public interest in receiving the benefit of those laws,

---

[103] Pls.' Application at 23.

[104] *Id.*

[105] *Id.*

is substantial."[106] Defendants contend the border barriers will significantly reduce the number of undocumented immigrants who cross from Mexico into Texas,[107] which will in turn "reduce the threat to public health and safety because past apprehensions demonstrate that approximately 20% of illegal aliens had criminal records."[108] Defendants argue the public interest is also served by the border barriers' construction because it reduces the adverse environmental effects caused by illegal immigration. Specifically, Defendants note illegal entrants create roads and trails, which divert the normal flow of water and destroy sensitive vegetation; illegal entrants leave behind large quantities of trash, human waste, and abandoned vehicles; and ". . . illegal entrants fill water bottles in wetland locations, [which] can infest these protected Federal wetlands with invasive parasites and diseases [and] doom native fish and wildlife."[109]

After carefully considering the parties' arguments, the Court concludes Plaintiffs fail to successfully develop their claim that preserving the waived laws outweighs the public's interest in securing its borders. Because Defendants' arguments clearly demonstrate DHS and the public will be adversely affected if the preliminary injunction is granted, the Court concludes Plaintiffs have failed to establish the third and fourth factors for granting a prelimi-

---

[106] Defs.' Resp. at 23.

[107] Defs.' Resp., Ahern Decl. ¶ 8 (noting a substantial decline in apprehensions of undocumented immigrants after completion of border barriers in the CBP San Diego Sector).

[108] *See id.* ¶ 25.

[109] *Id.* ¶¶ 19-20.

nary injunction. Plaintiffs have not shown the threatened injury to them outweighs the threatened injury to Defendants, nor have Plaintiffs demonstrated that granting the preliminary injunction will not adversely affect the public interest.

IV. CONCLUSION

For the reasons discussed, the Court concludes Plaintiffs have failed to establish the four factors for granting a preliminary injunction and the Court should, and hereby does, **DENY** Plaintiffs' Application for Preliminary Injunction [Rec. No. 19]. Accordingly, Plaintiffs' pending motion, "Plaintiffs' Unopposed Motion for Hearing Regarding Motion for Preliminary Injunction" [Rec. No. 27], is **DENIED AS MOOT**.

SO ORDERED.

SIGNED this **29th** day of **August, 2008**.

[signed]
FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

COUNTY OF EL PASO, *et al.*,
Plaintiffs,
v.
MICHAEL CHERTOFF, Secretary, U.S. Department of Homeland Security, and U.S. DEPARTMENT OF HOMELAND SECURITY,
Defendants.

EP-08-CA-196-FM

Sept. 11, 2008

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On this day, the Court considered Michael Chertoff, Secretary of the Department of Homeland Security ("Chertoff" or "Secretary"), and the Department of Homeland Security's ("DHS") (collectively, "Defendants") "Motion to Dismiss" (originally filed as "Memorandum of Points and Authorities in Opposition to Plaintiffs' Application for Preliminary Injunction and in Support of Defendants' Motion to Dismiss") [Rec. No. 21], filed June 24, 2008, in the above-captioned cause. In their Motion to Dismiss, Defendants request the Court to dismiss Plaintiffs' Complaint because it fails to state a claim upon which relief can be granted. On July 8, 2008, County of El Paso, City of El Paso, El Paso County Water

Improvement District No.1, Hudspeth County Conservation and Reclamation District No. 1, Ysleta Del Sur Pueblo, Frontera Audubon Society, Friends of the Wildlife Corridor, Friends of Laguna Atascosa National Wildlife Refuge, and Mark Clark (collectively, "Plaintiffs") filed their "Brief Opposing Defendants' Motion to Dismiss" (originally filed as "Reply Brief in Support of Plaintiffs' Application for Preliminary Injunction and Brief Opposing Defendants' Motion to Dismiss") [Rec. No. 23]. "Defendants' Reply Memorandum in Support of Defendants' Motion to Dismiss" [Rec. No. 26] followed on July 21, 2008. After carefully considering the parties' briefs, arguments, and applicable law, the Court concludes it should grant Defendants' Motion to Dismiss.

I. BACKGROUND

On June 2, 2008, Plaintiffs filed their "Complaint for Declaratory and Injunctive Relief' ("Complaint") [Rec. No.1]. In their Complaint, Plaintiffs raise three constitutional challenges to Chertoff s congressionally-delegated waiver authority:[1] (1) a Nondelegation challenge pursuant to Article I, Section 1, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Constitution, and (3) a federalism challenge pursuant to the Constitution's Tenth Amendment. On June 23, 2008, Plaintiffs filed their "Application for Preliminary Injunction" [Rec.

---

[1] In 2005, pursuant to the REAL ID Act, Congress gave the Secretary, "notwithstanding any other provision of law . . . the authority to waive all legal requirements such Secretary . . . determines necessary to ensure expeditious construction of the barriers and roads under this section." ("Waiver Legislation"). Pub. L. No. 109-13, § 102, 119 Stat. 231, 306 (2005), codified at 8 U.S.C. § 1103 note ("Section 102").

No. 19], requesting the Court to enjoin Defendants from constructing any fencing, walls, or other physical barriers along the United States-Mexico border in Texas, New Mexico, Arizona, and California, unless and until DHS complies with the laws waived by Chertoff on April 3, 2008.[2] On August 29, 2008, the Court entered its "Memorandum Opinion and Order Denying Plaintiffs' Application for Preliminary Injunction" ("Memorandum Opinion and Order") [Rec. No. 28].

II. MOTIONS TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)") authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted."[3]

---

[2] On April 3, 2008, Chertoff exercised his authority, pursuant to Section 102, and published two notices in the Federal Register waiving "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" various federal statutes explicitly waived "with respect to the construction of roads and fixed and mobile barriers" along the United States-Mexican border. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 73 Fed. Reg. 19077 ("Hidalgo County Waiver") & 19078 ("Multi-state Waiver") (Apr. 8, 2008). Specifically, Chertoff waived twenty-seven laws to facilitate construction of barriers and roads along twenty-two miles of the Texas-Mexico border in Hidalgo County, Texas. *Id* at 73 Fed. Reg. 19077. Chertoff also waived thirty-seven laws to facilitate construction of barriers and roads along 470 miles of the United States-Mexico border in Texas, New Mexico, Arizona, and California. *Id* at 73 Fed. Reg. 19078.

[3] FED. R. CIV. P. 12(b)(6).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief that is plausible on its face. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact.[4]

Nonetheless, a "motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted."[5] "The task of the court in ruling on a Rule 12(b)(6) motion 'is merely to assess the legal feasibility of the complaint, [and] not to assay the weight of the evidence which might be offered in support thereof.'"[6] Thus, when considering a Rule 12(b)(6) motion, a court must accept all well-pleaded facts as true, and construe all reasonable inferences in the light most favorable to the plaintiffs.[7] Although the

---

[4] *Vanderbrook v. Unitrin Preferred Ins. Co. (In re Katrina Canal Breaches Litigation)*, 495 F.3d 191, 205 & 205 n.10 (5th Cir. 2007) (internal quotations and citations omitted) (citing *Bell Atl. Corp. v. Twombly*, __ U.S. __, __, 127 S. Ct. 1955, 1974 (2007)) (noting the Supreme Court's clarification of the minimum standard of adequate pleading governing a complaint's survival).

[5] *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

[6] *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998) (quoting *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984)).

[7] *See Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *Capital Parks, Inc. v. Se. Adver. & Sales Sys., Inc.*, 30 F.3d 627, 629 (5th Cir. 1994); *see also Jolly v. Klein*, 923 F. Supp. 931, 942 (S.D. Tex. 1996) ("A motion to dismiss under FED. R. CIV. P. 12(b)(6) for failure to state a claim tests only the formal sufficiency of the statements of the claims for relief. It is not a procedure for resolving contests about the facts or the merits of the case.").

Court must accept well-pleaded allegations in a complaint as true, it does not afford conclusory allegations similar treatment.[8]

III. DISCUSSION

In their Complaint, Plaintiffs raise three constitutional challenges to the Waiver Legislation: (1) a Nondelegation challenge pursuant to Article I, Section 1, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Constitution, and (3) a federalism challenge pursuant to the Constitution's Tenth Amendment. In their Motion to Dismiss, Defendants argue "[P]laintiffs' [C]omplaint should be dismissed with prejudice [because] the Waiver Legislation is clearly constitutional and there are no relevant factual disputes that would prevent dismissal."[9]

The Court previously analyzed Plaintiffs' constitutional challenges at length in the Memorandum Opinion and Order it entered on August 29, 2008, in which it denied Plaintiffs' Application for Preliminary Injunction. First, the Court found the Waiver Legislation did not violate the Nondelegation Clause because "Congress constitutionally delegated its authority in the Waiver Legislation [when] it provided the Secretary with an intelligible principle to guide his discretionary waiver of legal requirements to expeditiously complete construction of physical barriers and roads at the nation's borders."[10] The

---

[8] *See Kaiser*, 677 F.2d at 1050 (citing *Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)).

[9] Defs.' Mot. to Dismiss at 24.

[10] Mem. Op. & Order Den. Pls.' Applic. Prelim. Inj. at 9.

Court also found "the Supreme Court does not require judicial review to satisfy the intelligible principle standard."[11]

Second, the Court found the Waiver Legislation did not violate the Presentment Clause because "unlike the laws at issue in *Clinton* [*v. City of New York*],[12] which no longer had any "legal force or effect" whatsoever once the President applied the line-item veto, the laws waived pursuant to Section 102 still overwhelmingly remain in effect outside the limited scope of the Secretary's waiver."[13] Finally, the Court found the Waiver Legislation did not violate the Tenth Amendment because "Section 1 02 clearly manifests congressional intent to preempt state and local laws which would interfere with Congress's objective to expeditiously construct the border fence. Moreover, even if Section 102 does not contain explicit preemptive language, the Waiver Legislation still preempts these laws, pursuant to the Supreme Court's explanation of conflict preemption."[14]

The Court finds its Memorandum Opinion and Order is dispositive of Plaintiffs' constitutional claims for purposes of Defendants' Motion to Dismiss. Therefore, in construing all reasonable inferences in the light most favorable to Plaintiffs, the Court concludes Plaintiffs' Complaint should be dis-

---

[11] *Id.* at 11.

[12] 524 U.S. 417 (1998). In Clinton, the Supreme Court struck down the Line Item Veto Act of 1996 because "[i]n both legal and practical effect," it authorized the President to amend "Acts of Congress by repealing a portion of each" in violation of the Presentment Clause. Id. at 438.

[13] Mem. Op. & Order Den. Pls.' Applic. Prelim. Inj. at 16.

[14] *Id.* at 22.

missed for failure to state a claim upon which relief can be granted.

IV. CONCLUSION AND ORDERS

For the reasons discussed, the Court concludes it should, and hereby does, **GRANT** Defendants' Motion to Dismiss [Rec. No. 21]. The Court **DISMISSES** the above-captioned cause **WITH PREJUDICE**.

SO ORDERED.

SIGNED this 11th day of **September, 2008**.

[signed]
FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

No. 08-751

In the Supreme Court of the United States

COUNTY OF EL PASO, TEXAS, ET AL., PETITIONERS

v.

JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
MICHAEL F. HERTZ
Acting Assistant Attorney General
DOUGLAS N. LETTER
JONATHAN H. LEVY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Congress has directed the installation of physical barriers and roads to prevent illegal crossing of the Nation's border and has provided that, "[n]otwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 102(c)(1), 110 Stat. 3009-555, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 102, 119 Stat. 306. The questions presented are:

1. Whether this waiver provision constitutes an unconstitutional delegation of legislative power to the Executive because only limited judicial review of the Secretary's discretionary action is permitted.

2. Whether the statutory authority to "waive all legal requirements" is a sufficiently clear statement permitting the waiver of state and local (as well as federal) legal requirements.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provision involved 2
Statement 2
Argument 7
Conclusion 29
Appendix 1a

TABLE OF AUTHORITIES

Cases:

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 16
Allen v. *Wright*, 468 U.S. 737 (1984) 8
Amalgamated Meat Cutters v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971) 15
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 16
Carlson v. *Landon*, 342 U.S. 524 (1952) 20
Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 12, 23
DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 8
Dalton v. *Specter*, 511 U.S. 462 (1994) 24
Davis v. *FEC*, 128 S. Ct. 2759 (2008) 11, 12
Defenders of Wildlife v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008) 6, 8, 14
Federal Energy Admin. v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976) 20

Cases—Continued: Page

Fidelity Fed. Sav. & Loan Ass'n v. *De la Cuesta*, 458 U.S. 141 (1982) 28
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 22, 24
Hillsborough County v. *Automated Med. Labs., Inc.*, 471 U.S. 707 (1985) 28
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 13, 28
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 17
J.W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928) 16, 20
Lichter v. *United States*, 334 U.S. 742 (1948) 20
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 25
Loving v. *United States*, 517 U.S. 748 (1996) 16, 17, 19
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 8, 10, 11
Mistretta v. *United States*, 488 U.S. 361 (1989) ... 16, 17, 20
Murdock v. *Pennsylvania*, 319 U.S. 105 (1943) 15
NLRB v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987) 22
Norwegian Nitrogen Prods. Co. v. *United States*, 288 U.S. 294 (1933) 23
Opp Cotton Mills, Inc. v. *Administrator of the Wage & Hour Div. of the Dep't of Labor*, 312 U.S. 126 (1941) 21
Panama Ref. Co. v. *Ryan*, 293 U.S. 388 (1935) 16
Salitros v. *Chrysler Corp.*, 306 F.3d 562 (8th Cir. 2002) 15
Save Our Heritage Org. v. *Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008) 14

Cases—Continued: Page

Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) 13
Shivwits Band of Paiute Indians v. *Utah*, 428 F.3d 966 (10th Cir. 2005), cert. denied, 549 U.S. 809 (2006) 15
Sierra Club v. *Ashcroft*, No. 04CV0272-LAB (JMA), 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005) 6, 14
Skinner v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989) 21
South Dakota v. *United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), vacated, 519 U.S. 919 (1996) 14
Summers v. *Earth Island Inst.*, No. 07-463 (Mar. 3, 2009) 8, 10
Touby v. *United States*, 500 U.S. 160 (1991) 16, 18, 19, 20
United States v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992), cert. denied, 507 U.S. 917 (1993) 16, 21
United States v. *Mazurie*, 419 U.S. 544 (1975) 17
United States v. *Richardson*, 418 U.S. 166 (1974) 13
United States v. *Widdowson*, 916 F.2d 587 (10th Cir. 1990), vacated, 502 U.S. 801 (1991) 15
United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 18, 23, 24
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 13
Webster v. *Doe*, 486 U.S. 592 (1988) 19

Cases—Continued: Page

Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 6, 16, 19, 20
Wilton v. *Seven Falls Co.*, 515 U.S. 277 (1995) 14
Yakus v. *United States*, 321 U.S. 414 (1944) 20, 21

Constitution and statutes:

U.S. Const.:
Art. I:
§ 1 19
§ 7:
Cl. 2 7
Cl. 3 7
Art. III 8, 12, 24
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 22
5 U.S.C. 701(a)(1) 22
5 U.S.C. 701(a)(2) 22
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 2
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 2
§ 101, 110 Stat. 3009-553 2
§ 102, 110 Stat. 3009-554 ..... 2, 5
§ 102(a), 110 Stat. 3009-554 ..... 2, 6, 17
§ 102(b), 110 Stat. 3009-554 4
§ 102(c), 110 Stat. 3009-555 ..... 2, 3, 26, 27
§ 102(c), as added by § 102, 119 Stat. 306 .... *passim*

Statutes—Continued: Page

§ 102(c)(1), as added by § 102, 119 Stat. 306 ..... *passim*
§ 102(c)(2)(A)-(C), as added by § 102, 119 Stat. 306 3
§ 102(c)(2)(C), as added by § 102, 119 Stat. 306 14
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 2
REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, 119 Stat. 302 3
Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 3
§ 2(a), 120 Stat. 2638 4
§ 2(b), 120 Stat. 2638 4
§ 3, 120 Stat. 2638-2639 4
6 U.S.C. 251 3
6 U.S.C. 291 3
8 U.S.C. 1103(a)(1) 3
8 U.S.C. 1103(a)(5) 3
25 U.S.C. 13 25

Miscellaneous:

Black's Law Dictionary (8th ed. 2004) 26
151 Cong. Rec. (daily ed. Feb. 10, 2005):
p. H554 27
p. H556 27
p. H561 27

In the Supreme Court of the United States

No. 08-751

COUNTY OF EL PASO, TEXAS, ET AL., PETITIONERS

v.

JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court granting respondents' motion to dismiss (Pet. App. 49a-55a) is unreported. The opinion of the district court denying petitioners' motion for preliminary injunction (Pet. App. 18a-48a) is unreported.

JURISDICTION

The judgment of the district court was entered on September 11, 2008. The petition for a writ of certiorari was filed on December 10, 2008. The jurisdiction of this Court is invoked under Section 102(c)(2)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 306. For the

reasons set forth below (see pp. 8-13, *infra*), it appears that petitioners now lack Article III standing to raise their claims.

STATUTORY PROVISION INVOLVED

Section 102(a)-(c) of IIRIRA, as amended in 2005 and 2006, is reprinted at App., *infra*, 1a-4a.

STATEMENT

1. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, Congress sought, among other things, to improve security at the Nation's borders in order to halt illegal immigration. Section 101 of IIRIRA increased the number of border patrol agents and their supporting personnel. See 110 Stat. 3009-553. Section 102 of IIRIRA specifically addressed physical barriers at the Nation's borders. Section 102(a) required the Attorney General to improve barriers at the border, and specifically required her to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." 110 Stat. 3009-554. Section 102(c) provided that the provisions of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, "are waived to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section." 110 Stat. 3009-555.

When it created the Department of Homeland Security (DHS), Congress transferred the Attorney General's powers and duties to "control and guard the boun-

daries and borders of the United States against the illegal entry of aliens" to the Secretary of Homeland Security (Secretary). 8 U.S.C. 1103(a)(1) and (5); see also 6 U.S.C. 251 and 291.

In 2005, Congress amended several federal laws with the declared purpose of "protect[ing] against terrorist entry." REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, 119 Stat. 302. One of those amendments expanded the scope of Section 102(c) of IIRIRA, which had authorized the waiver of the ESA and NEPA if necessary to ensure expeditious construction of barriers and roads at the border. That waiver provision now reads as follows:

> Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

IIRIRA § 102(c)(1), as amended, 119 Stat. 306.

Congress also provided for limited and streamlined judicial review of such waivers. A federal district court may hear a claim arising from the Secretary's exercise of the waiver authority, but only if the claim "alleg[es] a violation of the Constitution of the United States"; the claim must be brought within 60 days after the waiver; and any district court decision is reviewable only through a writ of certiorari from this Court. IIRIRA § 102(c)(2)(A)-(C), as amended, 119 Stat. 306.

In the Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638, Congress imposed additional obligations

on the Secretary with regard to border security. Among other things, it gave the Secretary 18 months to take "all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States," through both border surveillance and "physical infrastructure enhancements." § 2(a), 120 Stat. 2638. Congress defined "operational control" as "the prevention of *all unlawful entries* into the United States." § 2(b), 120 Stat. 2638 (emphasis added). Section 3 of the Secure Fence Act amended Section 102(b) of IIRIRA by expanding the number of places where Congress expressly directed that the Secretary erect border fencing. 120 Stat. 2638-2639.

2. a. In orders that took effect on April 8, 2008, the Secretary executed two waivers under Section 102(c)(1), finding the waivers were necessary to ensure the expeditious construction of barriers and roads required by Congress. Pet. App. 4a, 15a. He waived the applicability of "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" specified federal statutes with respect to such construction along numerous designated portions of the United States border with Mexico that he had determined were areas "of high illegal entry into the United States." *Ibid.*

b. On June 2, 2008, petitioners filed this lawsuit, alleging that the statutory waiver authority in Section 102(c)(1) of IIRIRA effected an unconstitutional delegation of legislative authority to the Executive, a violation of the Constitution's lawmaking procedures, and a violation of the Tenth Amendment and constitutional principles of federalism. Compl. ¶¶ 33-47. Petitioners sought a declaration that the statutory waiver authority in gen-

eral and the two specific waivers noted above are unconstitutional. *Id.* at 17. Their complaint sought an injunction against construction of border barriers or related infrastructure in the relevant areas "unless and until the Government has complied with all applicable laws." *Ibid.*

Petitioners also requested a "preliminary injunction barring [DHS] from proceeding with construction of any fencing, walls, or other physical barriers or related infrastructure." Application for Preliminary Injunction 1, 3:08-cv-196-FM Docket entry No. 19 (W.D. Tex. June 23, 2008). In support of that request, petitioners submitted declarations explaining that the actual construction of border barriers and related infrastructure would cause them irreparable injury by, for example, cutting off an Indian Tribe's access to a stretch of the Rio Grande River used in religious ceremonies, "impair[ing] the ability of the [El Paso County Water Improvement] District [No. 1] to deliver water," and damaging "the natural environment of the Lower Rio Grande Valley." Paiz Decl. ¶¶ 3-4, 3:08-cv-196-FM Docket entry No. 19-3 (W.D. Tex. June 23, 2008); Reyes Decl. ¶ 7, 3:08-cv-196-FM Docket entry No. 19-4 (W.D. Tex. June 23, 2008); Bartholomew Decl. ¶ 9, 3:08-cv-196-FM Docket entry No. 19-2 (W.D. Tex. June 23, 2008); see also Pet. 8-9 (describing two of those declarations).

3. The district court denied petitioners' request for a preliminary injunction. Pet. App. 18a-48a. The court first held that the statutory grant of authority to the Secretary to waive otherwise applicable laws is constitutional "because [Congress] provided the Secretary with an intelligible principle to guide his discretionary waiver of legal requirements." *Id.* at 28a. The court explained that the intelligible principle was supplied by Section

102 of IIRIRA, which provides that the Secretary can waive those laws only as "necessary to ensure expeditious construction" of "physical barriers and roads * * * to deter illegal crossings in areas of high illegal entry." § 102(a), 110 Stat. 3009-554; § 102(c)(1), as amended, 119 Stat. 306; see Pet. App. 26a-27a (citing *Sierra Club* v. *Ashcroft*, No. 04CV0272-LAB (JMA), 2005 U.S. Dist. LEXIS 44244, at *8-*9 (S.D. Cal. Dec. 12, 2005), and *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119, 127 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008)).

The district court also rejected petitioners' contention that "a constitutional delegation of legislative authority requires an intelligible principle *and* judicial review." Pet. App. 28a. Among other things, it cited this Court's decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001), which it described as holding that "a constitutionally permissible delegation only require[s] Congress to provide an intelligible principle to guide the exercise of delegated authority." Pet. App. 30a. The district court observed that petitioners cited no decision of this Court striking down a statute under the nondelegation doctrine for lack of judicial review, and that this Court had denied a petition for certiorari in *Defenders of Wildlife* v. *Chertoff*, *supra*, which would have given it the opportunity to impose a requirement of judicial review. Pet. App. 32a. The district court also noted that limited judicial review of the Secretary's waiver decisions is in fact available. *Ibid.*

Finally, the district court rejected petitioners' suggestion that the language of Section 102(c)(1) lacks the "clear statement" that petitioners contended was necessary to indicate Congress's intent to preempt the operation of state or local (as opposed to federal) law. Pet.

App. 39a-43a. The court concluded that the statute constitutes an express preemption provision because of its unambiguous statement that the Secretary has authority "notwithstanding any other provision of law," to "waive all legal requirements." *Id.* at 39a (quoting IIRIRA § 102(c)(1)).[1]

Having concluded that petitioners had failed to establish a substantial likelihood of success on the merits, the district court went on to conclude that petitioners had not shown (1) a substantial threat that they would suffer irreparable injury in the absence of a preliminary injunction, Pet. App. 43a-46a, (2) that the threatened injury to them outweighed the threatened injury to the defendants, *id.* at 46a-48a, or (3) that granting the preliminary injunction would not adversely affect the public interest, *ibid.*

The district court later granted respondents' motion to dismiss, based on the analysis contained in its earlier opinion denying petitioners' application for a preliminary injunction. Pet. App. 49a-55a.

ARGUMENT

Petitioners repeat their contentions that the waivers authorized by Section 102(c)(1) of IIRIRA reflect an unconstitutional delegation of legislative authority because the statute provides for only limited judicial review (Pet. 11-21), and that the statutory authority to

---

[1] The district court also rejected petitioners' contention—not raised in their petition for a writ of certiorari—that Section 102(c)(1) violates the bicameralism and presentment requirements of Article I of the Constitution (U.S. Const. Art. I, § 7, Cl. 2 and 3). Pet. App. 34a-36a. The court explained that the same argument had been rejected in *Defenders of Wildlife* and was inadequately developed by petitioners here. *Ibid.*

"waive all legal requirements" does not allow for the preemption of state and local (as opposed to federal) laws (Pet. 21-29). Because petitioners no longer seek to enjoin construction of border barriers, they appear to lack standing to pursue their claims. In any event, the decision of the district court is correct and does not conflict with any decision of this Court or any other court. This Court has already denied certiorari in a case that presented petitioners' first question. *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008). Review in this case is also unwarranted.

1. As an initial matter, this Court appears to lack Article III jurisdiction over this case, because petitioners, as plaintiffs, bear the burden of adequately alleging "(1) an injury that is (2) 'fairly traceable to the defendant's allegedly unlawful conduct' and that is (3) 'likely to be redressed by the requested relief.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 590 (1992) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)); see *Daimler-Chrysler Corp.* v. *Cuno*, 547 U.S. 332, 340 (2006). That burden applies for "each type of relief" that petitioners seek. *Summers* v. *Earth Island Inst.*, No. 07-463 (Mar. 3, 2009), slip op. 4.

a. With respect to the Secretary's waiver of *federal* statutes, petitioners' only alleged injuries flow from the construction of border barriers and related infrastructure. See Compl. ¶¶ 28 (alleging that waivers harm water-district petitioners "by facilitating construction of border fencing"), 29 (alleging that waivers harm Indian Tribe petitioner because they "facilitate[] construction of fencing"), 30 (alleging that petitioners are harmed by the waivers because they "facilitate construction of border fencing"), 32 (alleging that waivers harm petitioner

Mark Clark because they "will facilitate construction of fencing"); see also p. 5, *supra* (citing petitioners' declarations alleging imminent and irreversible injury from threatened construction); Pet. 8-9 (describing same).

Although petitioners previously requested an injunction against the construction of border barriers—which *could* have redressed the injuries they have alleged in association with the waiver of federal statutes—their petition for a writ of certiorari changes course and concedes "the broad authority of the Secretary to waive federal legal requirements that are truly necessary to achieve [expeditious construction of the border fence]." Pet. 33. Accordingly, they no longer seek "a judgment enjoining further construction of the fence." *Ibid.*[2] Instead, petitioners now state that, with respect to the waiver of federal statutes, the constitutional infirmity is "the statute's preclusion of judicial review to ensure that the Secretary's waiver decisions comply with applicable legal requirements," and they claim that infirmity can be corrected by interpreting (or modifying) the statute "to provide for judicial review of the Secretary's actions." *Ibid.* The relevant jurisdictional questions are thus whether petitioners' alleged injuries are fairly traceable to the limitations on judicial review of the waiver determinations and also whether providing judi-

---

[2] As of the filing date of this brief, DHS has substantially completed construction of approximately 309 miles of pedestrian fencing (out of a planned 358 miles), and has substantially completed construction of approximately 301 miles of vehicle fencing (out of a planned 303 miles). Included within those totals are the 22 miles in Hidalgo County that are the subject of one of the two waivers at issue in this case as well as substantial portions of the 470 miles covered by the second waiver. Construction continues on the remaining segments of planned fencing.

cial review for compliance with statutory requirements is likely to redress those injuries.

The statutory limitations on judicial review, by themselves, do not constitute a redressable injury. "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers*, slip op. 8. To demonstrate standing, petitioners must show "that the procedural violation [here, the limitations placed on judicial review of waiver determinations] endangers a concrete interest of [petitioners]." *Lujan*, 504 U.S. at 573 n.8.

Accordingly, petitioners must allege that the existence of judicial review would create a reasonable possibility that the specific injuries they allege could be redressed. But they have not done so. As noted above, the specific injuries they allege stem from construction of border barriers. It necessarily follows that the statutory waivers cause them harm only to the extent that they facilitate the construction of those barriers. And, indeed, as noted above, the gravamen of the complaint is that the waivers harm petitioners precisely because they "will facilitate construction of border fencing." Compl. ¶ 30; see also *id.* ¶¶ 29 (alleging that "[b]ut for the waiver," construction of border fencing "would be barred" by one of the waived federal statutes), 31 (noting that waiver of a particular federal statute was necessary "to proceed with construction").

Because petitioners here disclaim any request for injunctive relief to bar construction, the injuries they have alleged cannot be remedied through a declaratory judgment making available the expanded judicial review that they now seek. Such review presumably would be invoked to determine whether the Secretary had com-

plied with the only statutory limitation on his waiver authority: the requirement that each waiver be "necessary to ensure the expeditious construction of the barriers and roads under this section." IIRIRA § 102(c)(1), as amended, 119 Stat. 306. But petitioners do not (and cannot) allege that the Secretary's waivers were not necessary for that purpose; in fact, their complaint specifically alleges harm because the waivers *will* facilitate construction. It therefore is difficult to see how petitioners could obtain meaningful relief through the judicial-review proceedings that they claim are necessary, while at the same time they disavow any need or intention to stop construction. As a result, they appear to lack standing to contest the waiver of federal statutes, because their alleged injuries cannot fairly be traced to the absence of judicial review, and providing judicial review of the waivers would not redress any such injuries.[3]

b. With respect to the Secretary's waiver of state and local laws, petitioners have simply failed to allege the requisite injury. As this Court has noted, "[t]o qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent." *Davis* v. *FEC*, 128 S. Ct. 2759, 2768 (2008) (citing *Lujan*, 504 U.S. at 560-561). Petitioners allege that the waivers call into question or cast doubt on the continuing validity of various state, county, and city laws, thus leaving the governmental petitioners and their citizens without certainty about the state of the law. Compl. ¶¶ 25-27. But the governmental petitioners do not cite any particular state or local provision that has been invalidated or the validity of which the waivers have called into question.

[3] In this regard, it is telling that petitioners refer to the "*potential* impairment of private rights by the Secretary's orders," Pet. 19 (emphasis added), rather than any actual or concrete impairment.

Nor do they identify any actual instance in which they have been *injured* by any such consequence of a waiver.[4] Their alleged uncertainty is not "concrete, particularized, and actual or imminent." *Davis*, 128 S. Ct. at 2768. Instead, it is vague, general, potential, and contingent. Moreover, the well-established bar on federal courts' issuance of advisory opinions, see, *e.g.*, *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), would be routinely circumvented if any state or local governmental entity could allege Article III injury on the basis of abstract uncertainty resulting from the existence of unanswered "questions" about the extent of its legal authority.

Petitioners' complaint does allege that waiver of "the Texas Antiquities Code, and other laws related to historic preservation," would injure the "aesthetic, cultural, artistic, professional, and economic interests" of petitioner Mark Clark, as the owner of an historic building near the United States border with Mexico that houses a fine arts gallery and studio and also as a member of the Brownsville Heritage Review Committee. Compl. ¶ 32. But that allegation is also conclusory. It alleges no concrete or particularized injury, instead specifying only broad categories of interests allegedly injured.

---

[4] Petitioners similarly complain (Pet. 5, 19, 29) that the Secretary's waivers are "unclear," "vague," "uncertain[]" and "ambigu[ous]" with respect to which state and local laws have been waived, as to whom they are waived, in what physical locations they are waived, and the duration of the waivers. But they do not identify any specific harm they have allegedly suffered as a result of that asserted lack of clarity. Nor do they even claim that they have requested clarification by the Secretary in the first instance, or that they have been precluded from enforcing their laws in any proceeding.

Moreover, to the extent that the operation of any waived state or local law would interfere with the expeditious construction of the border fence, that state law is already preempted, regardless of whether the Secretary's waiver is effective, because, as petitioners concede, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. Pet. 27 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). Petitioners further concede (Pet. 32) that "Congress has directed the Department of Homeland Security to construct a substantial barrier along significant portions of the United States' international border, and has indicated that it regards the expeditious construction of the border fence to be of the highest priority." It follows that, to the extent any state or local law interferes with the expeditious construction of the border fence, it is necessarily preempted. Thus, to the extent that petitioners allege that the waivers harm them by expediting the construction of border barriers, any state law whose waiver they contest is preempted, thus preventing them from obtaining any real-world relief even if they could overturn the Secretary's waiver of state and local laws.[5]

c. In any event, federal courts have "substantial discretion" in deciding whether to grant declaratory relief.

---

[5] Petitioners note (Pet. 29-30) that the waivers at issue will stand unless this Court grants certiorari, because no other parties have sought judicial review within the limitations period. But, as this Court has previously explained, "[t]he assumption that if [petitioners] have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974); accord *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982); *United States* v. *Richardson*, 418 U.S. 166, 179 (1974).

Wilton v. *Seven Falls Co.*, 515 U.S. 277, 286 (1995). Thus, even if petitioners' interests were technically sufficient to create a controversy in the Article III sense, the inescapably abstract nature of their claims, which would not halt construction of the border barriers and roads, provides a sufficient reason to deny declaratory relief—and, a fortiori, certiorari.

2. There is, moreover, no split of authority with respect to the Secretary's exercise of waivers authorized by Section 102(c)(1) of IIRIRA. Four courts (including the district court in this case) have addressed challenges to the waiver provision, and all four have upheld its constitutionality. See Pet. App. 49a-55a; *Save Our Heritage Org.* v. *Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Defenders of Wildlife* v. *Chertoff*, *supra*; *Sierra Club* v. *Ashcroft*, No. 04CV0272-LAB (JMA), 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005).[6] That unanimity is not surprising in light of this Court's prior decisions, which, as discussed below, establish that the waiver is not an unconstitutional delegation of legislative power. Moreover, this Court denied certiorari in *Defenders of Wildlife*, which raised the same constitutional issue petitioners seek to litigate in their first question presented.

Petitioners contend (Pet. 15-16) that the decision below conflicts with other judicial decisions "appreciat[ing] that a permissible intelligible principle for the exercise of delegated power must be susceptible of analysis by a court." But this Court vacated the only court of appeals decisions petitioners cite for that proposition. See Pet. 16-17 (citing *South Dakota* v. *United States*

---

[6] There are of course no court of appeals decisions on point because district court decisions concerning the constitutionality of a Section 102(c) waiver are reviewable only by this Court. IIRIRA § 102(c)(2)(C), as amended, 119 Stat. 306.

Dep't of the Interior, 69 F.3d 878 (8th Cir. 1995), vacated, 519 U.S. 919 (1996); *United States* v. *Widdowson*, 916 F.2d 587 (10th Cir. 1990), vacated, 502 U.S. 801 (1991)).[7] Petitioners also cite (Pet. 16) *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971), a three-judge-district-court decision upholding the constitutionality of the Economic Stabilization Act of 1970 against a claim that it was an unconstitutional delegation of legislative authority to the Executive. Although the district court's opinion in that case does contain dicta indicating that the intelligible-principle requirement facilitates judicial review when such review is available, *id.* at 759-760, it contains no statement at all regarding the constitutionality of delegations of authority whose exercise is not judicially reviewable, including authority—like the statutory waiver at issue here—"where the legislature manifests an intent to avoid review in order to further its objective." *Id.* at 760. Nothing in *Amalgamated Meat Cutters* is contrary to the decision below.

Moreover, petitioners concede that, in addition to the fact that every court to have addressed the statutory waiver provision of Section 102(c) of IIRIRA has upheld

---

[7] Petitioners suggest (Pet. 17) that this Court's orders vacating the courts of appeals' decisions in *South Dakota* and *Widdowson* do nothing to undermine the force of those lower court decisions. But this Court has made clear that a vacated decision lacks precedential force. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 117 (1943). And both of the courts whose decisions were vacated also apply that view. See, *e.g.*, *Shivwits Band of Paiute Indians* v. *Utah*, 428 F.3d 966, 973 & n.4 (10th Cir. 2005) (specifically noting that because it was vacated by this Court, the *South Dakota* decision "has no precedential value"), cert. denied, 549 U.S. 809 (2006); *Salitros* v. *Chrysler Corp.*, 306 F.3d 562, 575 n.2 (8th Cir. 2002) ("A vacated decision is deprived of its precedential effect," even when vacated "on a different ground.").

its constitutionality, the only non-vacated court of appeals decision on the more general question of whether judicial review is necessary for a delegation to be constitutional held that such review is *not* necessary. Pet. 15 (citing *United States* v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992), cert. denied, 507 U.S. 917 (1993)).

3. The district court's decision with respect to the nondelegation doctrine follows the firmly established precedent of this Court. Petitioners correctly note "[t]he settled understanding that * * * a delegation of discretionary power to the Executive Branch is permissible so long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" Pet. 12-13 (brackets in original) (quoting *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989), and *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)); accord, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *Loving* v. *United States*, 517 U.S. 748, 771 (1996); *Touby* v. *United States*, 500 U.S. 160, 165 (1991). To provide a constitutionally sufficient "intelligible principle," Congress need only "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). That is not a difficult test to meet, and, as this Court has repeatedly observed, it has found only two statutes that lacked the necessary "intelligible principle"—and it has not found any in the last 70 years. *Whitman*, 531 U.S. at 474 (referring to *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935)); see *Loving*, 517 U.S. at 771 (same); *Mistretta*, 488 U.S. at 373

(same); *id.* at 416 (Scalia, J., dissenting) (explaining that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

The waiver provision in Section 102(c) of IIRIRA readily meets the applicable test. Congress has clearly delineated the general policy, namely "to ensure expeditious construction of the barriers and roads under this section," IIRIRA § 102(c)(1), as amended, 119 Stat. 306, which are, by definition, "in the vicinity of the United States border," and are erected "to deter illegal crossings in areas of high illegal entry into the United States," § 102(a), 110 Stat. 3009-554. Congress has clearly identified the Secretary as the public official who is to apply the standard. And Congress has established the boundaries of the Secretary's authority by permitting a waiver only for construction along the border and only when "necessary to ensure expeditious construction of the barriers and roads under" Section 102. § 102(c)(1), as amended, 119 Stat. 306.

Although there can be little doubt that Section 102(c) satisfies the usual test for an intelligible principle, "the same limitations on delegation" do not even apply in a case like this, in which "'the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" *Loving*, 517 U.S. at 772 (quoting *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975)). Here, the Executive Branch possesses independent authority over the subject matters related to border barriers, namely immigration, protection of the border, and advancement of foreign-relations interests. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is

especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (citation omitted); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950) ("The right to [exclude aliens] * * * is inherent in the executive power to control the foreign affairs of the nation."). Those considerations are, of course, at their zenith with respect to security at the very borders of the Nation.

Thus, it is not surprising that petitioners do not argue that the statutory waiver provision fails, per se, to provide a sufficiently intelligible principle.

4. Petitioners instead assert (Pet. 4, 11-12) that the intelligible-principle test should include an additional element; they contend that Congress cannot confer decisionmaking authority on the Executive unless it provides both an intelligible principle *and* judicial review of the Executive's compliance with the statutory standard. That assertion is contrary to this Court's previous decisions, and, with the exception of decisions vacated by this Court (see pp. 14-15, *supra*), petitioners cite no decision by any court holding that judicial review for statutory compliance is invariably necessary for a conferral of authority on the Executive Branch to be constitutional.

A similar argument was raised in *Touby* v. *United States*, *supra*, but the majority of the Court—unlike the concurring opinion of Justice Marshall that petitioners quote (Pet. 14)—did not announce any such rule. Instead, the majority concluded that it was sufficient that the statutory scheme at issue there, which imposed criminal sanctions for a violation, allowed a criminal defendant to challenge the administrative decision while defending himself against a prosecution. See *Touby*, 500

U.S. at 168-169. Even Justice Marshall's explanation of the need for judicial review in *Touby* depended on the fact that the administrative standard in question was enforceable "by criminal law"—implicating a species of personal rights that is not relevant in this case—and cited a passage in *Webster* v. *Doe*, 486 U.S. 592, 603-604 (1988), that preserved judicial review in a non-criminal context only for constitutional claims. See *Touby*, 500 U.S. at 170 (Marshall, J., concurring).

a. Petitioner's theory is not supported by the constitutional underpinnings of the nondelegation doctrine. The doctrine derives from the vesting of enumerated "legislative Powers" in Congress. See U.S. Const. Art. I, § 1. Accordingly, "the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman*, 531 U.S. at 472; accord *Loving*, 517 U.S. at 771 (explaining that the doctrine derives from "the understanding that Congress may not delegate the power to make laws"). The Judiciary's role (if any) is separate from the answer to that question. Whether or not a given power is "legislative" or constitutes "the power to make laws" under our Constitution has nothing to do with whether the exercise of that power is subject to judicial (or any other) review.

b. Petitioners' legal argument also cannot be reconciled with this Court's application of the intelligible-principle test as a one-step inquiry. In cases specifically addressing nondelegation arguments, it has been clear that the only constitutional requirement is that Congress *provide* an intelligible principle for the Executive. Indeed, petitioners acknowledge "[t]he settled understanding that * * * a delegation of discretionary power to the Executive Branch is permissible so long as Congress 'lay[s] down by legislative act an intelligible

principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" Pet. 12-13 (brackets in original) (quoting *Mistretta*, 488 U.S. at 372). According to the plain terms of that test, the only constitutional requirements are that Congress "lay down" the "intelligible principle" and "direct[]" the agency to conform to it, *not* that Congress also provide for judicial review as a mechanism by which compliance will be enforced. Numerous other decisions have repeated that clear formulation of the test, which stresses the establishment of a standard for the Executive to apply, without mentioning judicial application. See, *e.g.*, *Touby*, 500 U.S. at 165 (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409); *Mistretta*, 488 U.S. at 372 (same); *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976) (same); *Lichter* v. *United States*, 334 U.S. 742, 785 (1948) (same); see also *Carlson* v. *Landon*, 342 U.S. 524, 544 (1952) ("This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards."); *Whitman*, 531 U.S. at 489-490 (Stevens, J., concurring in part and concurring in the judgment) ("As long as the delegation *provides* a sufficiently intelligible principle, there is nothing inherently unconstitutional about it.") (emphasis added).

Nonetheless, petitioners assert (Pet. 13), that the purpose of requiring Congress to establish an intelligible principle is to facilitate judicial review, from which they further infer that judicial review must be constitutionally required. For that proposition, they rely on dictum in *Yakus* v. *United States*, 321 U.S. 414, 426 (1944), and cases that have quoted or paraphrased

Yakus. See Pet. 12-14.[8] But *Yakus* actually implies just the opposite:

> The standards prescribed by the present Act, with the aid of the 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise to enable *Congress, the courts and the public* to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Hence we are unable to find in them an unauthorized delegation of legislative power.

321 U.S. at 426 (emphasis added; internal citation omitted); accord *Opp Cotton Mills, Inc.* v. *Administrator of the Wage & Hour Div. of the Dep't of Labor*, 312 U.S. 126, 144 (1941). As this quotation makes clear, this Court has understood the purpose of the intelligible-principle test as facilitating accountability generally, rather than focusing on providing a framework for courts when they have a role in reviewing the agency's action. Thus, the intelligible-principle requirement also serves to ensure the availability of a basis for Congress and the public to evaluate the Executive's actions and to facilitate political remedies when an agency violates statutory standards. See *Bozarov*, 974 F.2d at 1041 (concluding that the better argument is that "the purpose of an intelligible principle is simply to channel the

---

[8] Petitioners also quote (Pet. 13-14) *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989), as evidence of a supposed commitment to the importance of judicial review, but the statements about judicial review in *Skinner* reflect the fact that judicial review was, in fact, available in that case. At any rate, those statements trace back through *Mistretta* to *Yakus* as their ultimate source. As explained in the text, *Yakus* is contrary to petitioners' suggestion that the purpose of the intelligible-principle test is to facilitate judicial review.

discretion of the executive and to permit Congress to determine whether its will is being obeyed," rather than "to permit a court to ascertain whether the will of Congress has been obeyed"). That is, of course, consistent with the numerous instances in which there is no judicial review of Executive action implementing statutory authorizations.

Indeed, while judicial review is now generally provided by the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, the APA did not exist until long after the nondelegation doctrine had been recognized, and it still does not apply, for example, to decisions of the President, see *Franklin* v. *Massachusetts*, 505 U.S. 788, 801 (1992), or to any decision that is committed to agency discretion or with regard to which judicial review would be inconsistent with the statutory scheme. See 5 U.S.C. 701(a)(1) and (2); see also, *e.g.*, *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 130-133 (1987) (holding that "prosecutorial" decisions of the General Counsel of the NLRB are not subject to judicial review, in part because review "would involve lengthy judicial proceedings in precisely the area where Congress was convinced that speed of resolution is most necessary"). Many decisions are thus, by their nature, not subject to judicial review, although political checks exist if the Executive exceeds the limits of a valid statute. If Congress believes that the Secretary's waiver in this case was overbroad or that it was not actually necessary to the expeditious construction of a border barrier in an area of high illegal entry, it can repeal or modify the waiver authority in IIRIRA, specify that certain laws are applicable to the relevant portion of the border fence, require alternative procedures in lieu of other

statutes, or employ a variety of political tools to exert pressure on the Executive.

c. Petitioners' contrary view—that the purpose of the intelligible principle requirement is *solely* to facilitate judicial review and that therefore judicial review is constitutionally required—is not only contrary to this Court's statement in *Yakus*, it is also belied by the fact that this Court has never suggested that the absence of judicial review creates a constitutional difficulty in its many decisions approving grants of authority by Congress to the Executive without judicial review for statutory compliance. Indeed, under petitioners' submission, in each of those cases, this Court approved an unconstitutional delegation. For example, in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948), the Court held that judicial review was not available for a decision by the Civil Aeronautics Board, with the approval of the President, to grant one entity (and deny another) the right to fly specified routes between the United States and foreign countries. *Id.* at 114. The authority to grant that right had been conferred by Congress through legislation, and this Court noted that it was irrelevant whether the authority was viewed as legislative or executive in origin because "Congress may of course delegate very large grants of its power over foreign commerce to the President." *Id.* at 109 (citing *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294 (1933)). In short, this Court concluded that the statutory authorization was valid despite the absence of judicial review. That holding forecloses petitioners' contrary argument.

Similarly, in *United States ex rel. Knauff* v. *Shaughnessy*, *supra*, this Court upheld the statutory grant of authority to the President, delegated to the Attorney

General, to impose restrictions and prohibitions on persons' entry into and departure from the United States when he determined that the public interest of the United States so required. 338 U.S. at 543-544. The Court concluded that Congress's broad authorization was constitutionally acceptable, despite the fact that the Executive's exclusion decisions applying that standard were not subject to judicial review. *Id.* at 543.

There are many other examples of this Court's approval of statutes that confer broad authority on the Executive in the absence of judicial review. For example, in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), Congress created a detailed scheme for the decennial census, at the culmination of which the President was to report to Congress on the population of each State and the number of Representatives in the House of Representatives to which it would then be entitled. The Court made clear that the President's duty in this regard was not "ministerial," *id.* at 800, and that he was to exercise statutory authority to make "policy judgments" regarding the census, *id.* at 799. Nevertheless, it held that the President's exercise of that authority was subject to judicial review only for constitutional violations and not for any failure to comply with statutes, *id.* at 801—which mirrors the result prescribed by the statutory limits on judicial review in this case.

The same is true of *Dalton* v. *Specter*, 511 U.S. 462 (1994), in which this Court addressed a statute granting the President the uncircumscribed authority to approve or disapprove a list of military bases to be closed. See *id.* at 470. The Court concluded that statutory judicial review of the President's decision was not available. *Id.* at 476.

In *Lincoln* v. *Vigil*, 508 U.S. 182 (1993), the Court considered a statute that appropriated funds to the Indian Health Service to spend "for the benefit, care, and assistance of the Indians," 25 U.S.C. 13. The Court concluded that the Indian Health Service's decision regarding what programs to fund was not judicially reviewable under the APA. *Lincoln*, 508 U.S. at 193-194. The opinion contains no hint that the absence of judicial review meant that the statute effected an unconstitutional delegation.

d. Petitioners acknowledge (Pet. 20) that judicial review is not constitutionally necessary for all delegations of authority by Congress to the Executive. They suggest that judicial review is required unless the relevant delegation falls within what they describe as "narrow but well-recognized exceptions to the general presumption of reviewability" for statutory authorizations otherwise "squarely within the independent authority of the Executive." Petitioners claim that category of exceptions includes such diverse subjects as "[d]elegations directly to the President, the exercise of prosecutorial discretion, allocations of lump-sum appropriations, and agency determinations that affect only public, as opposed to private rights." *Ibid.* The conceded existence of those multifarious, unrelated exceptions in no way means that the Constitution compels judicial review of the implementation of all other statutory authorizations.

5. In the second question presented, petitioners contend that the Secretary lacks authority under Section 102(c)(1)'s statutory waiver provision to waive the applicability of *state* or *local* laws in conjunction with the construction of border barriers. The statute itself plainly confers the necessary authority upon the Secretary.

Petitioners agree (Pet. 24) that Congress can "delegate[] authority to an agency to preempt" state and local laws. Their suggestion that the language of Section 102(c)(1) of IIRIRA does not confer that authority is without merit. Congress provided that "[n]otwithstanding *any other provision of law*, the Secretary of Homeland Security shall have the authority to waive *all legal requirements* such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." IIRIRA § 102(c)(1), as amended, 119 Stat. 306 (emphases added). The authority to "waive all legal requirements" encompasses the authority to preempt state and local laws.

Petitioners contend (Pet. 24) that Congress did not intend to confer authority to preempt state laws because it used the word "waive" instead of "preempt" or "supersede." But the word "waive" is not ambiguous; Congress unquestionably intended to confer upon the Secretary the authority to determine that state laws were inoperative because they would interfere with Congress's command to construct border barriers expeditiously. Petitioners provide no alternative explanation for what Congress meant.[9] Petitioners also suggest (Pet. 25) that

---

[9] Congress's reason for using the word "waive" here—rather than "preempt"—can be explained by both the history of the statute and the meanings of those two words. As noted above, IIRIRA Section 102(c) originally provided that the provisions of the ESA and NEPA "are *waived* to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section." 110 Stat. 3009-555 (emphasis added). In that context, "waived" was appropriate because the concept of "preemption" does not normally apply to *federal* statutes. See, *e.g.*, *Black's Law Dictionary* 1216 (8th ed. 2004) (defining preemption as "[t]he principle (derived from the Supremacy Clause) that a federal law can supersede or sup-

when Congress authorized the waiver of "all legal requirements," it was insufficiently clear that it meant to include state law. But that suggestion defies natural English usage. On its face, "all legal requirements" includes requirements imposed by state law. Indeed, elsewhere in the petition (Pet. 4), petitioners acknowledge that "the Act imposes no restrictions on the type of 'legal requirement' [the Secretary] may waive." And the legislative history of the REAL ID Act demonstrates that Members of Congress understood that the reference to "all legal requirements" was broad enough to reach state and local laws.[10] Contrary to petitioners' claims (Pet. 26), the statute here presents a "clear and unequivocal delegation of authority from Congress authorizing [an agency] to preempt," and the Secretary's waiver of state laws was therefore authorized.

Of course, even if there were no statutory waiver provision, the Secretary could still preempt state law to

---

plant any inconsistent state law or regulation"). When Congress later amended section 102(c) of IIRIRA to allow the waiver of "all legal requirements," that word choice followed from the use of "waive[r]" in the previous version of the statute and from the reference to "all legal requirements," which, by including federal laws, would again have made a reference to preemption peculiar.

[10] See, *e.g.*, 151 Cong. Rec. H561 (daily ed. Feb. 10, 2005) (statement of Rep. Dingell) ("Look at Section 102 of the bill. That section allows the Secretary of Homeland Security to waive ANY and ALL federal, state, or local law that the Secretary determines should be waived to ensure the construction of physical barriers and roads to deter illegal border crossings."); *id.* at H554 (statement of Rep. Harman) (criticizing "the radical steps of eliminating all State and local powers, let alone Federal, and rolling back all judicial review"); *id.* at H556 (statement of Rep. Oberstar) (speculating that the Secretary could use the waiver authority to "exempt [construction] contractors from Federal and State withholding").

accomplish the purposes of Section 102 of IIRIRA. State law is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).[11] And "[f]ederal regulations have no less preemptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982). Petitioners admit (Pet. 32) that Congress "has indicated that it regards the expeditious construction of the border fence to be of the highest priority," and they do not contend that any state law whose waiver is at issue here is consistent with that goal and nonetheless rendered inoperative by the Secretary's waiver. Accordingly, the state laws waived not only could be preempted by federal regulation but were in fact preempted by operation of Section 102(c)(1), independent of any express waiver executed by the Secretary.

---

[11] Petitioners quote (Pet. 27) *Hines* but state that agency action can only preempt state law "when a *court* finds" the necessary conflict. Neither *Hines* nor any other case of which we are aware requires a court finding before an agency action can have preemptive effect. To the contrary, this Court has made clear that "state law is nullified to the extent that it * * * 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Hines*, 312 U.S. at 67).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
DOUGLAS N. LETTER
JONATHAN H. LEVY
Attorneys

MARCH 2009

APPENDIX

Section 102(a)-(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-554 to 3009-555, as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 102, 119 Stat. 306, and the Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, provides as follows:

(a) IN GENERAL.—The Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.

(b) CONSTRUCTION OF FENCING AND ROAD IMPROVEMENTS IN THE BORDER AREA.—

(1) SECURITY FEATURES.—

(A) REINFORCED FENCING.—In carrying out subsection (a), the Secretary of Homeland Security shall provide for least [*sic*] 2 layers of reinforced fencing, the installation of additional physical barriers, roads, lighting, cameras, and sensors—

(i) extending from 10 miles west of the Tecate, California, port of entry to 10 miles east of the Tecate, California, port of entry;

(ii) extending from 10 miles west of the Calexico, California, port of entry to 5 miles east of the Douglas, Arizona, port of entry;

(iii) extending from 5 miles west of the Columbus, New Mexico, port of entry to 10 miles east of El Paso, Texas;

(iv) extending from 5 miles northwest of the Del Rio, Texas, port of entry to 5 miles southeast of the Eagle Pass, Texas, port of entry; and

(v) extending 15 miles northwest of the Laredo, Texas, port of entry to the Brownsville, Texas, port of entry.

(B) PRIORITY AREAS.—With respect to the border described—

(i) in subparagraph (A)(ii), the Secretary shall ensure that an interlocking surveillance camera system is installed along such area by May 30, 2007, and that fence construction is completed by May 30, 2008; and

(ii) in subparagraph (A)(v), the Secretary shall ensure that fence construction from 15 miles northwest of the Laredo, Texas, port of entry to 15 southeast of the Laredo, Texas, port of entry is completed by December 31, 2008.

(C) EXCEPTION.—If the topography of a specific area has an elevation grade that exceeds 10 percent, the Secretary may use other means to secure such area, including the use of surveillance and barrier tools.

(2) PROMPT ACQUISITION OF NECESSARY EASEMENTS.—The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act [8 U.S.C. 1103(b)] (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and

shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

(3) SAFETY FEATURES.—The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this subsection not to exceed $12,000,000. Amounts appropriated under this paragraph are authorized to remain available until expended.

(c) WAIVER.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) FEDERAL COURT REVIEW.—

(A) IN GENERAL.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have juris-

diction to hear any claim not specified in this subparagraph.

(B) TIME FOR FILING OF COMPLAINT.—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

(C) ABILITY TO SEEK APPELLATE REVIEW.—An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

132

5

FILED
MAR 24 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-751

In the Supreme Court of the United States

COUNTY OF EL PASO, ET AL.,
Petitioners,

v.

JANET NAPOLITANO, SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY, AND
U.S. DEPARTMENT OF HOMELAND SECURITY,
Respondents.

On Petition for a Writ of Certiorari to the United States District Court for the Western District of Texas

REPLY BRIEF FOR PETITIONERS

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
ELIZABETH G. OYER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

A. Petitioners Have Standing To Challenge The Preclusion Of Judicial Review 1

B. This Court Should Grant Review To Determine Whether Judicial Review Is Essential When Congress Delegates Broad Power To Administrative Agencies To Impinge On Private Rights 5

C. This Court Should Grant Review To Decide Whether An Agency Has Authority To Preempt State And Local Law On Its Own Authority Absent An Express Delegation. 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Boumediene v. *Bush*, 128 S. Ct. 2229 (2008) 8

Chicago & Southern Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 7

CSX Transp., Inc. v. *Easterwood*, 507 U.S. 658 (1993) 12

Cuomo v. *Clearing House Association, LLC*, cert. granted, No. 08-453 (Jan. 16, 2009) 11

Dalton v. *Specter*, 511 U.S. 462 (1994) 7

Darr v. *Burford*, 339 U.S. 200 (1950) 6

Defenders of Wildlife v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008) 6

Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 7

Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) 11

INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 9

Lincoln v. *Vigil*, 508 U.S. 182 (1993) 7

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 1, 2

NLRB v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987) 7

South Dakota v. *United States Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), vacated, 519 U.S. 919 (1996) 8

Summers v. *Earth Island Institute*, 129 S. Ct. 1142 (2009) 2

United States v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992) 8

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Shaughnessy*, 338 U.S. 537 (1950) 7, 9

United States v. *Widdowson*, 916 F.2d 587 (10th Cir. 1990), vacated, 502 U.S. 801 (1991) 8

Wade v. *Mayo*, 334 U.S. 672 (1948) 6

Wyeth v. *Levine*, No. 06-1249 (March 4, 2009) 9, 11

Yakus v. *United States*, 321 U.S. 414 (1944) 6, 7

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 9

STATUTES

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, tit. I, 110 Stat. 3009-5554, as amended ..... *passim*

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004) 11

REPLY BRIEF FOR PETITIONERS

The government's opposition cannot obscure the importance of the issues presented or the lower courts' need for guidance. *First*, it argues that petitioners do not have standing to challenge the preclusion of judicial review under Section 102(c). U.S. Br. 8. *Second*, it claims that the decision below, upholding Section 102(c)'s sweeping delegation notwithstanding the preclusion of review, follows established precedent. *Id.* at 16. *Third*, the government contends that Section 102(c) "plainly" confers authority upon the Secretary of Homeland Security to preempt state and local law. *Id.* at 25. None of these contentions has merit.

A. Petitioners Have Standing To Challenge The Preclusion Of Judicial Review.

The government's challenge to petitioners' Article III standing, U.S. Br. 8-11, is contrary to the factual record and to this Court's standing doctrine.

1. Absent Section 102(c) and the challenged waivers, petitioners would have had statutory causes of action and remedies to ensure that the construction of the fence occurs in a lawful manner that does not threaten a variety of concrete injuries they have alleged in their pleadings. In *Lujan* v. *Defenders of Wildlife*, the Court set forth the standing analysis appropriate to plaintiffs claiming procedural injuries—such as the complete denial of judicial review of the waivers challenged in this case—with the recognition that "all the normal standards for redressability and immediacy" are *not* required when the right a plaintiff seeks to enforce is essentially procedural. 504 U.S. 555, 572 n.7 (1992). The critical inquiry is whether "the procedures in question are de-

signed to protect some threatened concrete interest of [the plaintiffs] that is the ultimate basis of his standing." *Id.* at 573 n.8. So long as the underlying tangible injury suffices for standing, the procedural injury will establish standing as well. *Lujan*'s examples of constitutionally sufficient procedural allegations closely parallel the allegations here. See *ibid.*

Summers v. *Earth Island Institute*, 129 S. Ct. 1142 (2009), is to the same effect. While *Summers* states that a procedural injury "*in vacuo*" cannot confer standing, it reaffirms that a procedural injury that affects a live dispute over a "concrete interest" does. *Id.* at 1151.

2. Provision of judicial review could redress petitioners' claimed concrete injuries. Cf. U.S. Br. 10. The government appears to suppose that construction of a border fence *not* in compliance with applicable law would cause the same injuries as construction *in* compliance with the law, and so an injunction against construction would be the only apt remedy for an injury sustained by unlawful construction of the fence. But to state this argument is to refute it. Assuring that the construction of the fence proceeds in compliance with applicable federal laws could result in a variety of modifications to the design of the fence or the manner of its construction. Consequently, a legal error in the Secretary's waivers can be remedied short of enjoining the construction altogether. Judicial review for conformance with statutory standards would ensure a mode and manner of construction that preserves petitioners' concrete interests.[1]

---

[1] Due to a typographical error, the Petition incorrectly stated petitioners' requested remedy. See Pet. 33. The Court could

3. The government also claims that petitioners lack standing to challenge the Secretary's waiver of state and local laws "related to" the 37 waived federal laws because "the governmental petitioners do not cite any particular state or local provision that has been invalidated or the validity of which the waivers have called into question." U.S. Br. 11. This is an ironic argument, since it is *the Secretary* who has declined to specify which state and local laws have been preempted. As petitioners have explained, Pet. 28, given Section 102(c)'s preclusion of review, the Secretary's vague pronouncement of preemption means that she has arrogated to herself the future determination of exactly which state and local laws must be displaced in order to accommodate construction activities. Any cause or claim "arising from" any waiver determination—including, presumably, any dispute over which state and local laws are preempted—is barred from review 60 days after the waiver is made. § 102(c)(2)(B).

More fundamentally, local government entities, such as petitioners City of El Paso and County of El Paso, cannot be required to prove concrete injury, causation, and redressability before challenging the preemption of their own laws. Governments have a sovereign interest in enforcing their own laws. Respondents' position here is that the Secretary has the power unilaterally to preempt state and local laws, that Congress can insulate such a determination from judicial review, and that the local governments whose laws are preempted have no standing to challenge these determinations. A more extreme and un-

---

remedy the limitations on judicial review by enjoining the second and third sentences of Section 102(c)(2)(A), not the second section of Section 102(c)(1).

constitutional subordination of state and local authority is difficult to imagine.

4. The government did not argue that petitioners' underlying claims of injury fail to satisfy Article III standing requirements in the court below, for good reason. Petitioners include a county, a city, an Indian tribe, public corporations, advocacy groups, and an individual landowner. The injuries articulated by petitioners encompass private rights directly impinged by the Secretary's published waivers, as well as injuries to property arising from the Department's construction pursuant to those waivers. Among the examples in the record:

- Construction of the fence will block petitioner Ysleta del Sur Pueblo Indian tribe from accessing and protecting sacred tribal grounds that are important for religious and ceremonial purposes. Compl. ¶ 29; Decl. of Frank Paiz (June 23, 2008) ¶ 4.
- The construction will continue to damage and disrupt the infrastructure owned and maintained by petitioner El Paso County Water Improvement District No. 1, which provides water to more than 600,000 urban residents and farmers. Compl. ¶ 28; Decl. of Jesus Reyes (June 23, 2008) ¶¶ 7-8.
- The waiver of state and local law, including the Texas Antiquities Code, reduces the value of an historic building operated as a business near the Mexican border by petitioner Mark Clark and clouds his rights as owner and proprietor of property

in the area subject to the waiver of all applicable law. Compl. ¶ 32.

There can be no doubt that these injuries are concrete and particularized. Petitioners' standing is clearly established, and their injuries are redressable by a suitable judgment in this case. This Court has authority to resolve the case.

B. This Court Should Grant Review To Determine Whether Judicial Review Is Essential When Congress Delegates Broad Power To Administrative Agencies To Impinge On Private Rights.

The government erroneously claims that the delegation of broad discretion to waive laws that protect private rights, combined with a preclusion of judicial review to determine whether such waivers comport with the statutory standard, is consistent with this Court's decisions and does not conflict with lower court authority.

1. On the contrary, this Court has repeatedly pointed to the availability of judicial review in rejecting constitutional challenges to congressional delegations of authority; and it has never approved a broad delegation in which *no* form of judicial review for compliance with Congress's articulated policy can be found in a statute. See Pet. 12-14. Because it has never confronted a statute that wholly prohibited judicial review for conformity with Congress's will, the Court has not heretofore needed to determine whether such review is a necessary condition of up-

holding the constitutionality of broad delegations of authority to the Executive.[2]

2. Although the Court has not squarely held that judicial review is required where broad delegations of legislative authority threaten private rights, its precedents strongly suggest the Constitution compels this result. In at least five cases, this Court has emphasized that judicial proceedings are the means for determining whether an agency has conformed its action to the intelligible principle established by Congress. See Pet. 13-14. Allowing Congress to delegate broad legislative power to an agency subject to an intelligible principle, while at the same time removing the primary mechanism for ensuring that the agency adheres to that principle, defeats the very purpose of requiring an intelligible principle.

The government argues that the purpose of the intelligible principle requirement is to ensure broad public accountability, not judicial review. U.S. Br. 21. It emphasizes a passage in *Yakus* v. *United States* stating that the requirements of the challenged statute were "sufficiently definite and precise to enable Congress, the courts and the public to ascertain" whether the will of Congress was being obeyed. 321 U.S. 414, 426 (1944).

---

[2] The government claims this Court's order denying certiorari in *Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), cert. denied, 128 S. Ct. 2962 (2008), as evidence that the judicial review issue has been resolved. See U.S. Br. 14. Yet there are a variety of plausible reasons for the denial of review in *Defenders of Wildlife*. Pet. 31-32. Moreover, "[w]rits of certiorari are matters of grace," *Wade* v. *Mayo*, 334 U.S. 672, 680 (1948), so "such a denial has no legal significance whatever bearing on the merits of the claim." *Darr* v. *Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting).

Yet this Court also stated in *Yakus* that the purpose of requiring Congress to articulate an intelligible principle is to be able "in a proper proceeding to ascertain whether the will of Congress had been obeyed." *Id.* at 426. In context, this clearly refers to judicial review. And even if the intelligible principle requirement is designed to promote broad public accountability, it does not follow that the requirement may not serve an *additional and independent* purpose to provide a basis for judicial review, especially where the delegated power can be used to impair private rights, nor that judicial review is a dispensable ingredient in assuring public accountability.

The government's claim that this Court has approved delegations not subject to judicial review ignores the context of these decisions, which did not involve unreviewable action impinging on private rights. Compare Pet. 20 with U.S. Br. 22-25. Four of the cases cited by the government involved direct delegations of power to the President,[3] while the others involved unreviewable prosecutorial discretion, *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987), and unreviewable power to spend lump sum appropriations, *Lincoln* v. *Vigil*, 508 U.S. 182 (1993). At most, these cases establish that acts of Congress do not create a need for judicial review over areas where the President and Executive could otherwise exercise core executive functions. They do not establish that Congress could give the

[3] *Dalton* v. *Specter*, 511 U.S. 462 (1994); *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992); *United States* v. *Shaughnessy*, 338 U.S. 537 (1950); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948).

Executive broad power to interfere with private rights, and make the exercise of such power unreviewable. For example, they do not show that the Executive can be authorized to seize and hold persons against their will without any possibility of judicial review. Cf. *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008).

2. The government also fails to refute that the circuits are fundamentally divided on the necessity of judicial review to bind a broad delegation to its intelligible principle. Pet. 15-17; U.S. Br. 14-16. *South Dakota* v. *United States Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), vacated, 519 U.S. 919 (1996), and *United States* v. *Widdowson*, 916 F.2d 587 (10th Cir. 1990), vacated, 502 U.S. 801 (1991), were vacated on the understanding that judicial review was available. See Pet. 16-17. The Eighth and Tenth Circuits' reasoning that judicial review was required in those cases plainly conflicts with the Ninth Circuit's clear holding in *United States* v. *Bozarov*, 974 F.2d 1037, 1041 (9th Cir. 1992). The Court should grant review to eliminate the continuing confusion in the federal courts and the uncertainty surrounding whether the reasoning in cases like *South Dakota* and *Widdowson* may remain persuasive.

3. The government's opposition raises the novel defense that the Executive's special authority at the Nation's borders creates immunity from review of its actions there. See U.S. Br. 17-18. Under the government's view, the Executive could apparently exercise inherent authority to waive federal, state, and local laws in the vicinity of the United States border even *without* congressional authorization. See *ibid.* This sweeping theory of Executive power has no sound basis. See *Youngstown Sheet & Tube Co.* v. *Sawyer*,

343 U.S. 579 (1952). Nor do the government's authorities support this extraordinarily broad view of executive power. In *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999), and *United States* v. *Shaughnessy*, 338 U.S. 537 (1950), this Court simply reaffirmed the well-established principle that courts should defer to the Executive with regard to decisions to exclude individual aliens. See 526 U.S. at 425; 338 U.S. at 542-543. Nothing in either case suggests that the Executive's foreign affairs power extends so far as to allow the government to trample on federalism and separation of powers principles in the course of constructing a fence inside of the United States but near a foreign border.

C. This Court Should Grant Review To Decide Whether An Agency May Preempt State And Local Law On Its Own Authority Absent An Express Delegation.

The lower courts are divided on the question whether a general grant of rulemaking authority to an Executive agency suffices to empower that agency to preempt state and local law on its own authority. See Pet. 26-27. The government ignores the undeniable controversy among the circuits, advancing only a defense of the Secretary's authority. U.S. Br. 25-28. The Court should resolve the conflict.

1. The government characterizes Section 102(c) as a "clear and unequivocal delegation of authority from Congress authorizing [the Secretary] to preempt." U.S. Br. 27. Yet Section 102(c)'s grant of "waiver" authority does not remotely resemble the language Congress uses to expressly preempt state law. See Pet. 24 n.2; *Wyeth* v. *Levine*, No. 06-1249 (March 4, 2009), slip op. at 20 n.9.

a. The government cites a handful of remarks from the Congressional Record as evidence that "Congress understood that the reference to 'all legal requirements' was broad enough to reach state and local laws." U.S. Br. 27 & n.10. But those cited remarks refer to *different proposed statutory language* that was never enacted into law.

In the bill referred to in the government's citation, the waiver provision directed that the Secretary "shall waive all laws" necessary to ensure expeditious construction of barriers and roads. REAL ID Act, H.R. 418, 109th Cong., § 102 (2005). That bill also purported to foreclose all judicial review, even of constitutional violations. *Ibid.* In the version actually enacted, however, Congress rejected the "all laws" formulation and instead authorized the Secretary to waive "all legal requirements," suggesting a different understanding of the Secretary's authority. In any event, the legislative history of a bill containing language different from that actually enacted is entitled to little weight.

b. The government next seeks to conflate waiver with preemption. See U.S. Br. 26. As the government recounts, *id.* at n.9, in a prior version of the statute, *Congress*—not the Secretary—"waived" the Endangered Species Act and National Environmental Policy Act. As the government concedes, "In that context, 'waived' was appropriate because the concept of 'preemption' does not normally apply to *federal* statutes." *Ibid.* But the government's inference that "waived" became synonymous with "preempted" when the references to the ESA and NEPA were replaced with "all legal requirements" in the final REAL ID Act has no grounding in the text of the statute or its legislative history.

c. The government's argument from "natural English usage" is unavailing. U.S. Br. 27. "Waive" means either (1) "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily," or (2) "[t]o refrain from insisting on (a strict rule, formality, etc.); to forgo." *Black's Law Dictionary* 1611 (8th ed. 2004). Both definitions contemplate the suspension of legal requirements an agency otherwise has the right to insist on applying. But state and local law are not normally a federal agency's "to give up" or "refrain from insisting on." Thus, such laws are not a federal agency's to "waive."

2. As a fallback, the government urges that Section 102(c) functions as an ordinary authorization of conflict preemption, to be invoked at the Secretary's behest. It suggests that "the Secretary could [] preempt state law" even without a statutory authorization. U.S. Br. 27-28. While it is certainly true that state law may be preempted absent an express statement from Congress where it conflicts directly with federal law, *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000), the Court has never gone so far as to approve the government's startling contention that an agency may determine for itself when such a conflict has occurred and declare the assertedly conflicting state laws preempted. Cf. *Wyeth*, *supra* at 19 (Court does not rely on "agency proclamations of preemption").[4]

---

[4] *Cuomo* v. *Clearing House Association, LLC*, cert. granted, No. 08-453 (Jan. 16, 2009), asks the Court to determine whether *Chevron* deference is due an agency's interpretation of the scope of an *express* statutory preemption clause. That petition acknowledges that the related question raised here remains an open one. Pet., No. 08-453, at 24.

The government does not bother to explain how a conflict preemption analysis is appropriate given that the waivers do not even identify the state and local laws preempted, but merely purport to preempt all state and other laws "deriving from, or related to the subject of" 37 waived federal laws. See Pet. App. 4a-5a, 15a-17a. The fact that "[t]o prevail on the claim that [] regulations have pre-emptive effect, [the Secretary] must establish more than that they 'touch upon' or 'relate to' that subject matter," *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993), strongly suggests that the Secretary's ambiguous preemptive orders of all laws "*related to*" three dozen federal laws exceed her statutory authority, and hence have no constitutional foundation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
ELIZABETH OYER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners

MARCH 2009

No. 08-751

JAN, 12, 2009

IN THE

Supreme Court of the United States

COUNTY OF EL PASO, *ET AL.*,
Petitioners,

v.

MICHAEL CHERTOFF, SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY, AND
U.S. DEPARTMENT OF HOMELAND SECURITY,
Respondents.

On Petition for a Writ of Certiorari to the United States District Court for the Western District of Texas

BRIEF OF *AMICI CURIAE* THE CITY OF EAGLE PASS, TEXAS, AND OTHER CITIES AND OTHER AFFECTED PERSONS ALONG THE TEXAS-MEXICO BORDER IN SUPPORT OF PETITIONERS

KENNETH J. PFAEHLER
SHEJAL V. DESAI
Of Counsel
SONNENSCHEIN NATH & ROSENTHAL LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, D.C. 20005
(202) 408-6468

MICHAEL H. BARR
Counsel of Record
SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 768-6788

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
INTEREST OF THE *AMICI*	2
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. SECTION 102(c) OF IIRIRA PRESENTS A UNIQUELY BROAD DELEGATION WITHOUT JUDICIAL REVIEW	10
II. A WRIT OF CERTIORARI SHOULD ISSUE TO CONSIDER WHETHER A FEDERAL EXECUTIVE BRANCH AGENCY CAN NULLIFY STATE LAWS ON ITS OWN AUTHORITY	14
III. A WRIT OF CERTIORARI SHOULD ISSUE TO CONSIDER WHETHER BROAD DELEGATIONS TO UNELECTED MEMBERS OF THE EXECUTIVE BRANCH REQUIRE THE AVAILABILITY OF JUDICIAL REVIEW	18
CONCLUSION	24
APPENDIX A—List of *Amici*	1a
APPENDIX B—Congressional Research Service Memorandum, *Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Feb. 9, 2005	2a

TABLE OF AUTHORITIES

CASES	Page(s)
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	19
Alden v. Maine, 527 U.S. 706 (1999)	14
Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971)	19, 22
Clinton v. City of New York, 524 U.S. 417 (1998)	11
CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)	16
Department of Interior v. South Dakota, 519 U.S. 919 (1996)	22
Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976)	20
Fidelity Federal Savings and Loans Ass'n v. del Cuesta, 458 U.S. 141 (1982)	16
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	15
Gregory v. Ashcroft, 501 U.S. 452 (1991)	7, 14
Hines v. Davidowitz, 312 U.S. 52 (1941)	15
INS v. Chadha, 462 U.S. 919 (1983)	9, 18

TABLE OF AUTHORITIES

Page(s)

Mistretta v. United States,
488 U.S. 361 (1989) 9, 18

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 16

Printz v. United States,
521 U.S. 452 (1991) 14

Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (1999) 19

Skinner v. Mid-America Pipeline Co.,
490 U.S. 212 (1989) 9, 10, 18

South Dakota v. Department of Interior,
69 F.3d 878 (8th Cir. 1995), *vacated*,
519 U.S. 919 (1996) 22

Tafflin v. Levitt,
493 U.S. 455 (1990) 14

Touby v. United States,
500 U.S. 160 (1991) 9, 18

United States v. Bozarov,
974 F.2d 1037 (9th Cir. 1992),
cert. denied, 507 U.S. 917 (1993) 23

United States v. Hammoud,
381 F.3d 316 (4th Cir. 2004) (en banc),
vacated on other grounds, 543 U.S. 1097
(2005) 23

United States v. Nourse,
9 Pet. 8, 9 L. Ed. 31 (1835) 19

United States v. Widdowson,
916 F.2d 587 (10th Cir. 1990), *vacated*,
502 U.S. 801 (1991) 22

TABLE OF AUTHORITIES

Page(s)

Yakus v. United States, 321 U.S. 414 (1944) 9, 18

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 18

CONSTITUTION, STATUTES, RULES AND REGULATIONS

U.S. Const. amend. X 14

Administrative Procedures Act, 5 U.S.C. § 551 13

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Stat. 3009, 3009-554, (codified as amended at 8 U.S.C. § 1103 note) 2

- Section 102(c) ..... *passim*
- Section 102(c)(1) 7, 10, 20
- Section 102(c)(2)(A) 8, 18, 21
- Section 102(c)(2)(C) 8

Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. § 6303-05 12

Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et. seq.* 12

Rivers and Harbors Act of 1899, Mar. 3, 1899, ch. 425, 30 Stat. 1121 12

OTHER AUTHORITY

Christopher Sherman, *One Hidalgo County Community Won't Escape Border Fence*, Assoc. Press, Mar. 21, 2008 5

TABLE OF AUTHORITIES

	Page(s)
Congressional Research Service Memorandum, *Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Feb. 9, 2005	12
Federalist No. 39 (James Madison) (Clinton Rossiter ed., 1961)	14

IN THE

Supreme Court of the United States

No. 08-751

COUNTY OF EL PASO, *ET AL.*,
Petitioners,

v.

MICHAEL CHERTOFF, SECRETARY
U.S. DEPARTMENT OF HOMELAND SECURITY, AND
U.S. DEPARTMENT OF HOMELAND SECURITY,
Respondents.

On Petition for a Writ of Certiorari to the United States District Court for the Western District of Texas

BRIEF OF *AMICI CURIAE* THE CITY OF EAGLE PASS, TEXAS, AND OTHER CITIES AND OTHER AFFECTED PERSONS ALONG THE TEXAS-MEXICO BORDER IN SUPPORT OF PETITIONERS

STATEMENT

The City of Eagle Pass, Texas, and the other cities and entities along the Texas-Mexico border listed herein, respectfully submit this *amicus* brief in support of the petition for a writ of certiorari.[1]

[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribu-

INTEREST OF THE *AMICI*

Amici are cities, and other affected persons along the Texas-Mexico border who have been injured by waivers of state and local laws by the Secretary of the U.S. Department of Homeland Security, which are purportedly made pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note ("IIRIRA"). The *amici* share the view that these waivers of state and local laws by an unelected federal official raise profound, unanswered questions about the elimination of any judicial review (except on constitutional questions) of an executive agency's delegated, wholly discretionary power to waive any statutes, including state and local statutes, that the official sees fit in order to accomplish a given goal. The Homeland Security Secretary's exercises of his waiver power to date have been especially troubling because he has purported to waive "in their entirety" all "state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" thirty-seven different federal laws, without specifying which state and local laws he is waiving, for how long, in which geographic area, and with respect to which parties. The Secretary also has unilaterally expanded the scope of section 102(c)'s waivers from those needed "to ensure the expeditions construction of barriers and roads" authorized by section 102 of the IIRIRA to those needed to ensure the "*upkeep* of fences, roads, supporting elements, drainage, erosion control, safety features, surveillance, communication, and detection equipment of all types, radar and radio

---

tion to its preparation. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

towers, and lighting" in the Project Areas. (Pet'r's App. 4a, 15a) (emphasis added).

Each of the *amici* and their citizens are directly affected or potentially will be affected by the Secretary's waivers. The *amici* submit that the Secretary has impermissibly encroached on the most fundamental aspect of the sovereignty of our governments and the sovereignty of the State of Texas: the power to govern by our own duly enacted laws. In their scope, vagueness, apparent permanence (waiver of laws necessary to "upkeep," not just construct, the fence) and judicial unreviewability, the waivers issued by the Secretary of Homeland Security have dramatically inhibited the power of the governmental *amici*, and the State of Texas, to prescribe and enforce reasonable regulations necessary to preserve the public order, health, and safety.

The Secretary's waivers jeopardize the ability of the governmental *amici* to carry out their statutory duties to interpret and enforce Texas, county and municipal laws, regulations and ordinances. The waivers of all unnamed "state, or other laws, regulations and legal requirements . . . deriving from, or related to the subject of" the thirty-seven identified federal statutes waived leaves the *amici* and their citizens uncertain about the state of the law in their jurisdictions. The waivers call into question the continuing validity of numerous state statutes, county orders, judicial decrees and government contracts that might be construed as "deriving from, or related to the subject of" the enumerated federal statutes, including among others: the Texas Local Government Code, Antiquities Code, Natural Resources Code, Health and Safety Code, Agriculture Code, Parks and Wildlife Code, Penal Code, and Water Code and

Auxiliary Laws; county orders related to health and safety, waste disposal, and the environment; provisions of the municipal codes related to water and sewage, storm water management, air pollution, and noise control; city and county contracts, including contracts with the water improvement districts and others, for the delivery of water to the *amici* and their citizens; certain judicial decrees adjudicating water rights; contracts between water improvement districts and the United States authorizing the districts to divert water from the Rio Grande River; and city grant agreements with the State of Texas, which require the cities to certify to compliance with federal laws, including several of those waived, as a condition of receiving grant money.

The Secretary's exercise of his waiver authority thus interferes with the police powers of the governmental *amici* by rendering it impossible for the governmental *amici* to know which laws to enforce and which are waived, or to know against whom (if anyone) the laws may be enforced. It directly hinders the ability of the governmental *amici* to protect the health, safety and general welfare of their people by trampling the basic laws and regulations that have been enacted for those purposes.

Moreover, the Secretary's waivers have blockaded or will blockade the municipalities and counties' abilities to protect the health, safety and welfare of their citizenry in a quite concrete way as well. The "border" barriers are being constructed north of the Rio Grande River flood plain, sometimes as much as a mile inland. Property, businesses and houses in U.S. territory, but now on the south (Mexican) side of the wall, are being stranded from their governments. Entire neighborhoods will be on the south side of the

wall. *See* Christopher Sherman, *One Hidalgo County Community Won't Escape Border Fence*, Assoc. Press, Mar. 21, 2008. The Secretary's border barriers, then, will be an actual physical barrier prohibiting the governmental *amici* to fulfill their sovereign mandates to protect their citizens from crime, fire and other hazards. These barriers that isolate houses, businesses and communities will impede or prevent the governmental *amici* from rescuing or assisting their citizens in times of natural disaster (such as the flooding of the Rio Grande River). The Secretary's unbridled exercise of his wavier powers literally imperils the safety and welfare of many of the citizens of the governmental *amici*.

The waivers not only impair the *amici's* ability to serve their citizens and fulfill essential governance functions, but impose financial costs on the *amici* associated with implementing the Secretary's waivers. The waivers further imperil the citizens of the *amici* by interfering with the water improvement districts' access to and ability to maintain their canals, potentially damaging the facilities and infrastructure on which the districts rely to deliver water, potentially generating debris that could clog the districts' flood control infrastructure, circumventing the districts' permitting processes for use of district property, and interfering with the districts' standards for bridge construction, road maintenance and dust pollution, among other things - all of which threaten the supply of clean water to the citizens of *amici*. All of the effects listed above will impose significant financial costs on the *amici* that will, in turn, inevitably be passed through to the citizens of *amici*.

A list of the *amici* appears as Appendix A, reproduced at 1a.

SUMMARY OF ARGUMENT

To our knowledge, neither this Court, nor any federal court of appeals, has ever been asked to review a delegation of power to a single, unelected federal executive officer to effectively nullify or, at a minimum, suspend state and local statutory requirements that is this far reaching. Certainly no appellate court has ever upheld such a broad delegation of legislative power to the executive branch in the absence of judicial review. While the Constitution gives Congress the authority to regulate matters directly and to preempt contrary state regulation, the Constitution does not give federal officials the power to "waive" state laws of their choosing. *Amici* are aware of no appellate decision upholding such a waiver power. *Amici* also are aware of no instance in which an appellate court has construed authority to "waive" laws to mean that Congress intended to "preempt" state regulation or legal requirements.

The Court should grant the writ of certiorari to address whether such a delegation can be made without judicial review, and whether such a delegation can ever be made to "waive" attributes of state sovereignty, including the local police powers of the State of Texas, the City of Eagle Pass, and the other cities and local governments of Texas and the border states. These powers were reserved by the Tenth Amendment to the states. The power to preempt state laws and regulations delegated to Congress in the Constitution does not encompass the power of an unelected cabinet officer to rule by fiat in the border regions of this nation. The unrestricted grant of power to an unelected official to waive any law on the books he deems "necessary" for his purposes, including not only substantive laws but also procedural

statutes, raises the specter of arbitrary power and the loss of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Section 102 of the IIRIRA presents this Court with the most sweeping and starkest possible context to address this question, because Congress could scarcely have made a broader delegation than this one. Section 102(c)(1) of the IIRIRA grants the Secretary of Homeland Security, "[n]otwithstanding any other provision of law," the "authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." Pursuant to this authority, the Secretary already has issued five waivers nullifying thirty-seven federal statutes and all state and local laws, rules, regulations and legal requirements "deriving from, or related to the subject matter of," those specified federal statutes along much of the border with Mexico. The Secretary has not defined for local officials which particular laws are no longer in force. Nor has he explained whether they are waived in whole or just in part. Nor has he identified the geographical boundaries (inland from the border) of the waiver, the duration of the waiver, or even against whom these waivers apply.

The Secretary has asserted that these sweeping waivers are "necessary." But contrary to what normally would occur in the context of reviewable

agency action, he has offered no reasons why. Perhaps even more troubling, the Secretary has *sua sponte* expanded his waiver powers beyond those provided by Congress. Section 102(c) grants the Homeland Security Secretary "the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious *construction* of the barriers and roads under this section." (emphasis added). The Secretary's waivers, by contrast, waive laws not only concerning the construction of the barriers, but also with respect to the "upkeep of fences, roads, supporting elements, drainage, erosion controls, safety features, surveillance, communications, and detection equipment of all types, radar and radio towers, and lighting" in the Project Areas. (Pet'r's App. 4a, 15a.) The Secretary may believe that his waivers are permanent.

Neither the scope of the waivers, nor the Secretary's expansion of his statutory authority by administrative fiat, nor the actual "necessity" of the waivers, nor the possibly permanent nullification of state laws, can be reviewed by the courts except on constitutional grounds. IIRIRA § 102(c)(2)(A).[2] Indeed, because of the statute's sixty-day statute of limitations (as explained in greater detail below), this case presents the last chance for *any* court to ensure that the Secretary's April 3, 2008 waivers conform to the Constitution. Absent review by the Court, every city and county along the border, and their citizens, businesses and water districts, will be subjected to the Secretary's interpretation of the scope of his dele-

---

[2] The statute also precludes any right of appeal to the Courts of Appeal following a determination of a constitutional question. IIRIRA § 102(c)(2)(C).

gated authority. He will be the sole arbiter of which laws he has waived, whether the waived laws are partially or totally inoperative, whether the hundreds of state and local laws implicated by his ambiguous waiver have been preempted and to what extent, how long the waivers shall remain in effect, and whose compliance with the laws are waived. This unchecked power over the communities of Texas (and the rest of the border states) contravenes basic principles of federalism and decimates the "residual and inviolable sovereignty" of the states that the Framers envisioned and that has been part of our Constitutional framework since the founding.

The absence of judicial review of the Secretary's waiver power is at the heart of the problems posed by the statute. Assurance of judicial review has been crucial to this Court's review of constitutional challenges to Congressional delegations of power and preemption of state laws and regulations. In particular, the availability of judicial review underlies this Court's "intelligible principle" jurisprudence. *See, e.g.*, *Touby v. United States*, 500 U.S. 160, 168-69 (1991); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 426 (1944).

However, this Court has never directly addressed the question of whether, in the case of an exceptionally broad delegation, satisfaction of the "intelligible principle" test requires the availability of judicial review. Put another way, can the "longstanding principle" that Congress may delegate powers to the executive branch "so long as Congress provides an administrative agency with standards guiding its actions

such that a Court could 'ascertain whether the will of Congress has been obeyed . . .'" be satisfied if the "court" is entirely removed from the principle's operation? *See Skinner*, 490 U.S. at 218 (emphasis added). This Court has never directly answered this question, which is of critical importance to ensuring that Congress's delegation of authority to executive branch agencies is done in a manner consistent with separation of powers. The *amici* respectfully submit that this, too, renders a grant of certiorari important and necessary.

ARGUMENT

I. SECTION 102(c) OF IIRIRA PRESENTS A UNIQUELY BROAD DELEGATION WITHOUT JUDICIAL REVIEW

Whether a federal executive branch agency can freely and without judicial review waive any state law that it, in its unfettered discretion, deems "necessary" to its purposes, and whether the non-delegation principle requires judicial review for especially broad grants of policymaking authority, are questions presented here in the context of an unprecedently sweeping delegation of authority by Congress to the Homeland Security Secretary. Section 102(c) of the IIRIRA provides:

> (c)(1) Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

IIRIRA § 102(c)(1).

This sweeping delegation of authority is unprecedented. Certainly, a number of federal laws have authorized an agency official to waive legal requirements in particular circumstances, but such delegations typically involve directions to the executive to waive particular provisions of particular federal laws (most commonly, only provisions of the same law containing the waiver authority), and such waivers usually are subject to judicial review. Crucially, in every instance we know of where the executive branch has been authorized by Congress to waive a law, the laws that are permitted to be waived are *federal* laws. We know of no instance in which a federal official has been given the right to simply "waive" state and local laws "necessary" in his view to achieve his purposes.

Moreover, prior delegations to an executive agency of the power to waive laws usually, if not always, have involved the waiver of laws within the purview of that agency's expertise and specialized knowledge, and therefore differ from "the delegation at issue here in that agencies often develop subsidiary rules under the statute," thus diminishing "the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation." *Clinton v. City of New York*, 524 U.S. 417, 489 (1998) (Breyer, J., dissenting) (citing 1 K. Davis, *Administrative Law* § 3:15, pp. 207-208 (2d ed. 1978)).

Here the delegation, while limited by Congress as to purpose, is unlimited as to application. The Secretary of Homeland Security, upon a mere pronouncement that he finds waiver "necessary," can waive any law promulgated by any authority in effect anywhere in the nation. As far as we can determine, Congress has never delegated to a federal agency anything ap-

proaching such an omnibus waiver authority. As an independent study by the Congressional Research Service concluded:

> After a review of federal law . . . we were unable to locate a waiver provision identical to that of § 102 of H.R. 418—*i.e.*, a provision that contains 'notwithstanding language,' provides a secretary of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws. Much more common, it appears, are waiver provisions that (1) exempt an action from other requirements contained in the Act that authorizes the action, (2) specifically delineate the laws to be waived, or (3) waive a grouping of similar laws.

Congressional Research Service Memorandum, *Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Feb. 9, 2005, at 5a-6a, reproduced at Appendix B.

The Secretary's exercise of the Section 102(c) waiver delegation has been even more unfettered in practice than it is in authorization. The Secretary's two April 3, 2008, waivers, covering almost 500 miles of territory along the Mexican border from California to Texas, waive "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" thirty-seven laws, including among other things environmental laws, historic preservation acts, the Rivers and Harbors Act, the Federal Land Policy and Management Act, the Federal Grant and Cooperative Agreement Act of 1977, acts protecting the exercise of religious

freedom, and the entirety of the Administrative Procedures Act.[3]

Secretary Chertoff's state law waivers are potentially even broader, because the Secretary did not identify which state or local laws he is waiving. Nor did he specify when the waivers will end. *Amici* do not even know *if* they will end, as Congress instructed, upon completion of the construction of the roads and barriers, because the April 3, 2008 waivers metastasized Congress's delegation to waive when "necessary . . . to ensure the expeditious construction of the barriers and roads" into a waiver for the purpose of, among other things, the "upkeep of fences, roads, supporting elements, drainage, erosion controls, safety features, surveillance, communications, and detection equipment of all types, radar and radio towers, and lighting" in the Project Areas. (Pet'r's App. 4a, 15a.) Nor has the Secretary provided an explanation of why he finds it "necessary" to waive all provisions of 37 federal statutes and all provisions of every state and local law, ordinance, rule, regulation or requirement relating to them. (*Id.*)

The sweeping delegation without judicial review to the Homeland Security Secretary in Section 102(c) of the IIRIRA and his exercise of that delegated authority to bulldoze wide swathes of unidentified state and local law not only to construct barriers and roads, but to "upkeep" many other things, raises vital questions that this Court should address about whether Congress (or the Secretary) have overreached into the sovereign domain of the states and

---

[3] The laws that the Secretary has identified that he is waiving are identified in the waivers, which are included in the Appendix to the Petition. (Pet'r's App. 4a - 5a, 15a - 17a.)

whether there has been an unconstitutional delegation of power which, in the utter absence of judicial review, violates the separation of powers doctrine.

II. A WRIT OF CERTIORARI SHOULD ISSUE TO CONSIDER WHETHER A FEDERAL EXECUTIVE BRANCH AGENCY CAN NULLIFY STATE LAWS ON ITS OWN AUTHORITY

Under the Supremacy Clause, federal officials have no inherent authority to waive state laws. On the contrary: it "is incontestable that the Constitution established a system of dual sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997) (*citing Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The states "retain a residuary and inviolable sovereignty." *Alden v. Maine*, 527 U.S. 706, 714-15 (1999) (quoting *The Federalist No. 39*, p. 245 (C. Rossiter ed. 1961) (J. Madison)). Residual state sovereignty is expressly protected by the Tenth Amendment of the Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. The Constitution also contemplates, as Madison expressed it, that the "local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *The Federalist No. 39*, at 245, *quoted in Printz*, 521 U.S. at 920-21.

The district court below offered several justifications for upholding the Secretary's assertion of power

to preempt state and local laws. None pass constitutional muster.

One justification presented by the district court was that Section 102(c) is itself an express preemption clause. This claim is untenable. Section 102(c) authorizes the Secretary to "waive" laws that might, in his judgment, impede the expeditious construction of the border fence. While federal officials are occasionally given authority to waive *federal* laws that they are charged with administering, federal officials have no authority to *"waive"* state laws. State laws can be *preempted* only when they conflict with or frustrate federal laws, or when Congress clearly intends that state laws be displaced, but preemption is not waiver.

The district court concluded that the Homeland Security Secretary's exercise of his waiver power reflects nothing more than an application of the principle that state laws that conflict with federal law are necessarily preempted. The court reasoned that "even if the Waiver Legislation does not contain explicit preemptive language," state law is still "conflict preempt[ed]" by the Secretary's waivers. (Pet'r's App. 40a.) While agency action can preempt state law without an express grant of preemptive authority where a *court* determines that "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)), or when a *court* finds that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), the determination must nonetheless be left to a *court*—not to unreviewable administrative fiat. By contrast, here the Secretary

himself has made the decision to preempt all state and local laws "of, deriving from, or related to the subject of" each of thirty-seven federal statutes that he had waived. This far exceeds anything previously recognized as conflict preemption. Moreover, precedent teaches that the Secretary's articulated basis for preemption is inadequate. "To prevail on the claim that the regulations have pre-emptive effect, [the Secretary] must establish more than that they touch upon 'or relate to' that subject matter." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-384 (1992)).

There is a more fundamental flaw with the district court's conflict preemption argument. Even if the district court correctly applied the conflict preemption framework applicable here, "question[s] remain[] whether the [Secretary] acted within [his] statutory authority in issuing the pre-emptive" regulation and whether or not there actually is a conflict. *Fidelity Fed. Sav. and Loans Ass'n v. de la Cuesta*, 458 U.S. 141, 159 & n. 14 (1982). After all, the Secretary has not enumerated which state and local laws are displaced; nor does he explain why all laws "of, deriving from, or related to the subject of" his mandate under the IIRIRA are *actually conflicting* with execution of that mandate. Without judicial review, the district court's assertion that the "Secretary, pursuant to the Supremacy Clause, has only waived state and local laws which interfere with Congress's purpose to construct the border barrier" (Pet'r's App. 40a) cannot be verified, because the Secretary has not identified which state and local laws he has waived. Moreover, the district court's assurance also is betrayed by the actual language of the waivers, which provide that the Secretary is waiving state and

local laws that he considers necessary for the "upkeep" of things that are not barriers and roads. Nor can the district court's assurance be tested by anybody in any forum, and thus it cannot be enforced.

The district court also offers the hollow consolation that after "carefully reviewing the Waiver Legislation, the Court concludes the Secretary's waivers do not affect the validity of the state and local laws." (Pet'r's App. 41a.) "Rather, the waivers merely suspend the effects of the state and local laws. The state and local law remain operative to the extent they have not been preempted by the Waiver Legislation according to its own terms, *i.e.*, those laws that do not interfere with the expeditious construction of the border fence." (*Id.*) Again, however, the district court's assurance is betrayed by the terms of the waivers. The "suspension" of laws is of indefinite duration, and may be permanent with respect to "upkeep." How, thus, do laws remain "valid" when they are indefinitely, and perhaps permanently, unenforceable? How can it even be determined to what extent the laws remain operative when the waivers are expressly not limited to the construction of the border fence? How can any of the district court's assumptions be tested when there is no forum for review of the Secretary's decisions? After all, the district court's decision, coupled with Section 102(c)'s sixty-day statute of limitations, makes the Secretary the sole arbiter of preemption decisions. The statute's preclusion of judicial review, once this narrow window has closed, guarantees that any dispute over which laws fall within the vague bounds of the Secretary's declarations of preemption will be resolved by agency fiat. This Court should grant review to confirm that these questions are inherently judicial, and that no agency is entitled to confer upon itself a lim-

itless and unreviewable power to waive state and local laws as it chooses.

III. A WRIT OF CERTIORARI SHOULD ISSUE TO CONSIDER WHETHER BROAD DELEGATIONS TO UNELECTED MEMBERS OF THE EXECUTIVE BRANCH REQUIRE THE AVAILABILITY OF JUDICIAL REVIEW

Section 102(c) of the IIRIRA forbids judicial challenges to Secretary Chertoff's waiver determinations and the exercise of his waiver power. Only constitutional challenges may be made.

The Court has consistently highlighted the availability of judicial review of administrative action as an essential predicate to upholding broad delegations of congressional power under the "intelligible principle" requirement. *See, e.g., Touby v. United States*, 500 U.S. 160, 168-69 (1991); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218 (1989); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Yakus v. United States*, 321 U.S. 414, 436 (1944).

The availability of judicial review ensures executive compliance with congressional will, and thereby ensures that the executive branch is limited to enforcing the law, rather than making it. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). "[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Touby*, 500 U.S. at 170 (Marshall, J., concurring) (*citing Skinner*, 490 U.S. at 218-19).

In the modern era of broad delegations to administrative agencies, judicial review assures the continuing validity of Chief Justice Marshall's observation:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

United States v. Nourse, 9 Pet. 8, 28-29, 9 L. Ed. 31 (1835).

Therefore, "[o]ur constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 44 (1999) (Thomas, J., dissenting). This insight underlies the well-established presumption of the reviewability of agency action. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). "Concepts of control and accountability define the constitutional requirement." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three judge panel) (Leventhal, J.).

The waiver orders at issue illustrate the importance of this protection. The Secretary purported to interpret the statutory language defining "construction" to include, among other things, "*upkeep* of fences, roads, supporting elements, drainage, erosion

controls, safety features, surveillance, communication, and detection equipment of all types, radar and radio towers, and lighting." (Pet'r's App. 4a, 15a.) (emphasis added). This interpretation is seemingly at odds with the statute's plain command that the Secretary exercise his waiver authority only where "necessary to ensure expeditious *construction*"—not "upkeep"—of the border fence. IIRIRA § 102(c)(1) (emphasis added). Given Section 102(c)'s preclusion of judicial review for all but constitutional questions, however, there is no way the *amici* or other aggrieved parties can challenge the Secretary's expansive interpretation of his own power. The combination of a broad delegation and the preclusion of review thus permits the Secretary to extend the waivers' duration indefinitely or even permanently.

The uncertainty surrounding the duration of the waivers is not the only ambiguity in the Secretary's orders. It is unclear precisely which local laws have been waived. It is also unclear whether the Secretary was exempting only himself from compliance with our laws or the laws of Texas, or whether he was declaring all persons and governmental entities exempt from these legal requirements. Likewise, it is unclear how wide an area of land is covered by the orders.

"Congress has been willing to delegate its legislative powers broadly and the courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power within statutory limits." *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (*en banc*) (Leventhal, J., concurring) (footnote omitted), *cert. denied*, 426 U.S. 941 (1976). An excessively broad waiver provision that does not require the Secretary to provide reasons, and whose

invocation is not subject to judicial review, obfuscates any assessment of what the congressional will is, or whether it is being followed. Indeed, selective waiver actions by the Secretary may allow the agency to make law in a way that bypasses Article I procedures.

Under the terms of the statute, the only authority with the power to resolve non-Constitutional issues is the Secretary himself. Neither *amici* nor any other government body or private citizen will have any recourse to any court if the Secretary fails to resolve on ambiguity or a dispute, or does so in a way an aggrieved party regards as unlawful, or issues further waivers expansively construing the scope of this waiver authority. It is left to the Secretary alone to determine the scope of his powers vis-á-vis those of the *amici* and state and local governments, without any judicial check.

The potential impairment of governmental and private rights by the Secretary's orders is further compounded by Section 102(c)'s inordinately short statute of limitations. While the statute permits the district courts to hear "claim[s] * * * alleging a violation of the Constitution," such actions must be filed within sixty days of the date of the Secretary's *waiver* order—not sixty days from the infliction of any harm (even of constitutional stature) caused thereby. IIRIRA § 102(c)(2)(A). Absent judicial review, the Secretary's waiver of all state and local laws "of, deriving from, or related to the subject of" the federal statutes he has waived confers upon him the otherwise judicial function of determining whether and when state laws have been displaced by his actions once the sixty days have run. (Pet'r's App. 4a, 15a.) Moreover, the Secretary's actions may affect private, as well as public, rights, such as valuable water

rights currently held by municipal water authorities, or the rights of the private individuals and firms that purchase water from these authorities. The time even to constitutionally challenge these infringements of rights may have run even before the Secretary identifies which rights he has decided to infringe.

As described above, prior authority from this Court suggests the importance of judicial review as a predicate to the resolution of non-delegation claims. There has arisen, however, uncertainty and a split among the lower courts as to whether judicial review is required, an uncertainty that underlies the district court's reasoning on this point.

In *Department of Interior v. South Dakota*, 519 U.S. 919 (1996), this Court vacated and remanded without need for argument a judgment of the Eighth Circuit, after the Solicitor General had effectively conceded that the agency's action was judicially reviewable. The decision below is at odds with this decision of the Eighth Circuit, a decision of the Tenth Circuit, and a prominent three-judge district court decision from the District of Columbia, all of which state that a permissible intelligible principle for the exercise of delegated power must be susceptible of analysis by a court. *See South Dakota v. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996); *United States v. Widdowson*, 916 F.2d 587 (10th Cir. 1990), *vacated*, 502 U.S. 801 (1991); *Amalgamated Meat Cutters*, 337 F. Supp. at 746.

However, the dissenting opinion in *South Dakota v. Dep't of Interior* appears to raise doubts about the necessity of judicial review to a valid delegation of legislative power. 519 U.S. at 921-22 (Scalia, J., dissenting). This uncertainty is reflected in decisions

from the Fourth and Ninth Circuits. *United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc) ("it is not clear whether the nondelegation doctrine requires any form of judicial review"), *vacated on other grounds*, 543 U.S. 1097 (2005); *United States v. Bozarov*, 974 F.2d 1037, 1041-45 (9th Cir. 1992) (reversing district court's decision that the Export Administration Act violated the non-delegation doctrine because of the lack of a provision for judicial review), *cert. denied*, 507 U.S. 917 (1993).

This case presents the question in the starkest possible way. Section 102(c) of the IIRIRA presents the Court with a nearly unprecedented delegation of authority to waive any "legal requirements" in the nation. That authority is unchecked by any judicial review of whether the administrative agency is making those waivers in compliance with congressional will and in a reasoned fashion. The Secretary has employed this discretion aggressively, without substantive explanation, and to the direct detriment of the *amici* and their citizens. The characteristics of the challenged statute and its implementation make it an ideal vehicle to resolve the question of whether the grant of such broad waiver power to an unelected official, without judicial review of his use of that power, is constitutional.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

KENNETH J. PFAEHLER
SHEJAL V. DESAI
Of Counsel
SONNENSCHEIN NATH & ROSENTHAL LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, D.C. 20005
(202) 408-6468

MICHAEL H. BARR
Counsel of Record
SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 768-6788

Counsel for *Amici Curiae* The City of Eagle Pass, Texas, and Other Cities and Other Affected Persons Along the Texas-Mexico Border

APPENDIX

APPENDIX A

List of Amici

The following *amici* join in this brief:

City of Eagle Pass, Texas by resolution of the City Council.

Cameron County, Texas Commissioner John Wood.

City of Brownsville, Texas by authorization of Mayor Patricio M. Ahumada, Jr.

City of McAllen, Texas by action and authorization of the City Commission.

Chairman of the Texas Border Coalition and Mayor of Eagle Pass, Texas Chad Foster.

APPENDIX B

[LOGO]

Congressional Research Service

Memorandum February 9, 2005

SUBJECT: **Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders**

FROM: Stephen R. Viña and Todd B. Tatelman
Legislative Attorneys
American Law Division

Section 102 of H.R. 418, the REAL ID Act, captioned "Waiver of Laws Necessary for Improvement of Barriers at Borders," provides the Secretary of Homeland Security with authority to waive all laws he deems necessary for the expeditious construction of the barriers authorized to be constructed by § 102 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) (P.L. 104-208, Div. C, codified at 8 U.S.C. § 1103 note) and bars judicial review of such waiver decisions. This memorandum discusses the waiver provision in general; the extent to which Congress has passed laws that provide waivers comparable to §102 of H.R. 418; and the judicial review provisions. For background information on the border fence and § 102 of IIRIRA please refer to CRS Report RS 22026, *Border Security: Fences Along the U.S. International Border*.

H.R. 418, §102

Section 102 of H.R. 418 would amend § 102(c) of IIRIRA to read as follows:

> (c) Waiver—
>
> (1) IN GENERAL—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive, and shall waive, all laws such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.
>
> (2) NO JUDICIAL REVIEW—Notwithstanding any other provision of law (statutory or non-statutory), no court shall have jurisdiction—
>
> (A) to hear any cause or claim arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1); or
>
> (B) to order compensatory, declaratory, injunctive, equitable, or any other relief for damage alleged to arise from any such action or decision.

Waiver Provisions

If enacted, the new § 102 would provide the Secretary of Homeland Security with not only the authority to waive *all* laws he determines necessary to ensure the expeditious construction of the barriers and roads under § 102 of IIRIRA, but the *requirement* that the Secretary do so. This provision could provide the Secretary with broader waiver authority than what is currently in § 102(c) of IIRIRA. This authority would apparently include laws other than the

Endangered Species Act and the National Environmental Policy Act, but may not include a waiver of protections established in the Constitution.[1] All laws waived, however, must be determined by the Secretary to be necessary to ensure expeditious construction of the barriers and roads. The waiver authority provided by this amendment would also seem to apply to all the barriers that may be constructed under the authority of § 102 of IIRIRA—i.e., both to barriers constructed *in the vicinity of the border to deter illegal crossing in areas of high illegal entry*[2] and to the barrier that is to be constructed near the San Diego area.

Congress commonly waives preexisting laws, though the process necessary to complete the waiver and the number of laws waived vary considerably from provision to provision. Even more common is the use of the phrase, "notwithstanding any other provision of law." While the use of a broad "notwithstanding any

---

[1] See discussion *infra*. During debate of a similar exemption provision for the border fence in the 108th Congress, supporters argued that labor and other non-environmental laws would not be considered as included in the phrase "any other laws." 151 Cong. Rec. H8899-H8901 (debate of amendment to H.R. 10). It is also not clear if state laws would be included in this waiver provision.

[2] There does not appear to be any statutory or regulatory definition for "high illegal entry." Note however, that over the last seven years 97% of all illegal alien apprehensions were made along the Southwest border. *See* CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*. Such a high percentage could be noted by those who might contend that the authority in § 102(a) of IIRIRA is more applicable, at least for now, to our Southwest borders; ultimately, however, it is the Secretary of DHS who determines places of "high illegal entry" under the section.

other provision of law" rarely settles the interpretive question, such directives seem facially preclusive, and some courts have determined that "notwithstanding" language may serve to explicitly preempt the application of other laws.[3] Other courts, however, have held that such provisions are generally not dispositive in determining the preemptive effect of a statute.[4]

After a review of federal law, primarily through electronic database searches and consultations with various CRS experts, we were unable to locate a waiver provision identical to that of §102 of H.R. 418—i.e., a provision that contains "notwithstanding language," provides a secretary of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws.[5] Much more common, it appears, are waiver provisions that (1) exempt an action from other requirements contained in the Act that authorizes the action, (2) specifically delineate the laws to be waived, or (3) waive a grouping of similar

---

[3] *See e.g., Puerto Rico v. M/V Emily S.*, 132 F.3d 818 (1st Cir. 1997). In instances where "notwithstanding" language has been deemed controlling, courts sometimes buttress such decisions with an analysis of the underlying directives or legislative history of a statute. *See e.g., Illinois Nat'l Guard v. Federal Labor Relations Authority*, 854 F.2d 1396, 1402 (D.C. Cir. 1998).

[4] *See e.g., E.P. Paup v. Director, OWCP*, 999 F.2d 1341, 1348 (9th Cir. 1993); *Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996).

[5] Our search did not include a review of annual appropriations language, which may include similar waiver provisions. It should be noted however, that as a general proposition, appropriations language is limited to the year of the appropriation, which may limit the application of any waiver.

laws. The most analogous provisions that we located appear to be, at least on their face, the following:[6]

- 43 U.S.C. § 1652(c): Allows the Secretary of the Interior and other Federal officers and agencies the authority to waive any procedural requirements of law or regulation which they deem desirable for authorizations that are necessary for or related to the construction, operation, and maintenance of the Trans-Alaska oil pipeline system (e.g., rights-of-way, permits, and leases).[7]
- 25 U.S.C. §3406: Allows the Secretaries of the Interior, Labor, Health and Human Services, and Education, notwithstanding any other law, to waive any statutory requirement, regulation, policy, or procedure promulgated by their agency that is identified by a tribal government as necessary to implement a submitted tribal plan under the Indian Employment, Training and Related Services Demonstration Act of 1992, as amended.
- 20 U.S.C. §7426: Provides almost identical waiver language to that of 25 U.S.C. §3406, but for plans submitted by tribal governments

---

[6] Similarly, we found some provisions that exempt certain transactions or entities from all laws. *See e.g.*, 49 U.S.C. §11321 ("A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.").

[7] It is unclear how broadly a procedural requirement of law has been or could be interpreted.

for the integration of education and related services provided to Indian students.

There are also many other provisions that arguably grant broad waiver authority similar to that of § 102, but contain qualifications or reporting requirements that seem to limit their breadth.[8] Some of these waiver provisions grant the President or the head of an Executive agency the authority to waive a law[s] if deemed necessary in the *national interest* or in the interest of *national defense*. We cite here, some examples of this type of waiver authority:[9]

- 43 U.S.C. §2008: Allows the President to waive provisions of federal law he deems necessary in the national interest to facilitate the construction or operation of crude oil transportation systems or the Long Beach-Midland project. The President must submit his waiver to Congress, and Congress must pass a joint resolution before the President can take such actions under the waivers.
- 15 U.S.C. 2621: Allows the Administrator of the EPA to waive compliance with the Toxic Substances Control Act upon a request and determination by the President that the requested waiver is necessary in the interest of national defense.

---

[8] Examples of waiver authority with a congressional notification element include: 15 U.S.C. §719f; 22 U.S.C. §2378; 22 U.S.C. §2371; and 41 U.S.C. §413. Other examples of broad yet somewhat more limited waiver authority include: 10 U.S.C. §433; 22 U.S.C. §3861; 25 U.S.C. §1680h; 48 U.S.C. §1469d; and 50 U.S.C. §198.

[9] Other waiver authority in the national interest include: 10 U.S.C. § 1107(a); 22 U.S.C. §2375(d); 29 U.S.C. §793; 42 U.S.C. §6212(b); 42 U.S.C. §6393(a)(2); 50 U.S.C. §2426(e).

- 10 U.S.C. §433: Allows the Secretary of Defense, in connection with a "commercial activity," to waive federal laws pertaining to the "management and administration of Federal agencies," if compliance would create an unacceptable risk to an authorized intelligence activity. This provision further requires that the waiver be in writing and specifically describes the types of activities that pertain to the "management and administration of federal agencies," though it does not specify the actual laws.

As mentioned above and as the examples we have set forth arguably demonstrate, the breadth of waiver authority granted by § 102 of H.R. 418 does not appear to be common in the federal law searched.

Judicial Review Provisions

By including the language "no court," §102(c)(2) of H.R. 418 appears to preclude judicial review of a Secretary's decision to waive provisions of law by both federal and *state* courts. It is generally accepted that Article III of the United States Constitution grants Congress the authority to regulate the jurisdiction, procedures, and remedies available in federal courts.[10] However, what remains uncertain is whether Congress's authority, pursuant to Article III, extends to the jurisdiction, procedures, and remedies of state courts. In addition, it remains uncertain to what extent Congress has Article III authority to prevent courts, state or federal, from addressing and

---

[10] Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. Article III.

remedying issues arising under the United States Constitution.

With respect to Congress's ability to control the jurisdiction of state courts, the Supreme Court has ruled that subject to a congressional provision to the contrary, state courts have concurrent jurisdiction over all the classes of cases and controversies enumerated in Article III, except for suits between States, suits in which either the United States or a foreign state is a party, and those considered within the traditional jurisdiction of admiralty law.[11] Thus, it appears possible to argue that Congress has a plenary power to allocate jurisdiction between the state and federal courts. In other words, if, for example, Congress can make jurisdiction over an area of law exclusively federal,[12] thereby depriving state courts of any ability to hear the claim, it appears that Congress may also be able to remove a cause of action

---

[11] *See* 28 U.S.C. §§ 1251, 1331 *et seq.* (2004). In fact, the presumption is that state courts enjoy concurrent jurisdiction, and Congress must explicitly or implicitly confine jurisdiction to the federal courts to oust the state courts. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-84 (1981); *see also Tafflin v. Levitt*, 493 U.S. 455 (1990); *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990). For example, Justice Scalia has argued that, insomuch as state courts have jurisdiction generally because federal law *is* law for them, Congress can provide exclusive federal jurisdiction only by explicit and affirmative statement in the text of the statute, but as can be seen that is not now the rule. *See Tafflin v. Levitt*, 493 U.S. 455, 469 (1990).

[12] Perhaps the best example of an area of law that Congress has made exclusively federal is immigration. Federal Courts, however, also appear to have exclusive jurisdiction over the federal antitrust laws, despite the fact that Congress has never spoken either expressly or implicitly. *See General Investment Co. v. Lake Shore & Michigan Southern R.R. Co.*, 260 U.S. 261, 287 (1922).

from state courts without concurrently granting jurisdiction to the federal courts.

State courts, however, are often considered to be independent and autonomous from the federal court system. This independent status has led some scholars to argue that because the Constitution appears to reserve to the states the authority to control the jurisdiction of their own courts, Congress's "only means of allocating jurisdiction is through control of the federal court's jurisdiction."[13] The argument that state courts are autonomous can be derived, in part, from the Supreme Court's doctrine with respect to its ability to review decisions from state courts. While the Court has the authority to review a decision of a state's highest court, it has repeatedly held that it will not do so if the decision rests upon adequate and independent state grounds.[14] This rule is arguably designed to protect a state's interest in developing and applying its own laws. Thus, it would appear that an argument can be made that Congress does not possess the authority to regulate the jurisdiction of state courts directly. It may be the case, however, that Congress's ability to control the jurisdiction of the federal courts indirectly affects and alters the

---

[13] Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1080 (1992) (*citing Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990); *Gulf Oil Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); Henry M. Hart Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

[14] *See Colman v. Thompson*, 501 U.S. 722, 729 (1991) (stating that the Court will not review a state court decision "if the decision of the court rests on a state law ground that is independent of the federal question and adequate to support judgment").

jurisdiction of the state courts, which would appear to preserve their autonomous status.[15]

Turning to Congress's ability to remove jurisdiction with respect to claims arising under the Constitution, it appears that Supreme Court precedent requires that at least some forum be provided for the redress of constitutional rights.[16] While it appears that the Supreme Court has not directly addressed whether there needs to be a judicial forum to vindicate all constitutional rights, it appears that the Court has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues, as well as construction of statutes that purport to limit the Court's jurisdiction.[17] At least one justice, however, has indicated that there have been particular cases, such as political question cases, where all constitutional review is in effect precluded.[18]

---

[15] It should be noted, however, that a court may interpret this provision to be preclusive, which would appear to avoid any constitutional issues.

[16] *See Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). For a much more complete discussion of this issue, *see* CRS Report RL31271, *Limiting Court Jurisdiction Over Federal Constitutional Issues: "Court-Stripping,"* by Kenneth R. Thomas, Jan. 24, 2005.

[17] *See Johnson v. Robinson*, 415 U.S. 361, 366-67 (1974); *see also Weniberger v. Salfi*, 422 U.S. 749, 762 (1975); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 664, 681 n. 12 (1988); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Felker v Turpin*, 518 U.S. 651, 660-61 (1996); *INS v. St. Cyr*, 533 U.S. 289, 298, 314 (2001).

[18] *See Webster v. Doe*, 486 U.S. 592, 612-13 (1988) (Scalia, J., dissenting) ("Even apart from the strict text of the Constitution, we have found some constitutional claims to be beyond judicial

Nevertheless, the Court has generally found a requirement that effective judicial remedies be present. For example, in cases involving particular rights, such as the availability of effective remedies for Fifth Amendment takings, the Court has held that "the compensation remedy is required by the Constitution."[19] In addition, lower federal courts appear to have held that, in most cases, some forum must be provided for the vindication of constitutional rights.[20] Cases such as these would seem to provide a basis for the Court to find that parties seeking to vindicate other particular rights must have a judicial forum for such challenges; therefore, the Court may construe the provisions of H.R. 418 in a manner that preserves this right.

---

review because they involve "political questions." . . . In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.").

[19] *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 (1987) (*citing Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984); *United States v. Causby*, 328 U.S. 256, 267 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306 (1923); *Monongahela Navigation v. United States*, 148 U.S. 312, 327 (1893)).

[20] *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d. Cir. 1948) (stating that "while Congress has the undoubted power to give, withhold, or restrict the jurisdiction of courts other than the Supreme Court, it must not exercise that power as to deprive any person of life, liberty, or property without due process or just compensation . . . ."). In addition, other judicial decisions point to the doctrine of sovereign immunity and the ability of the government to limit the remedies available to plaintiffs. *See Bartlett v. Bowen*, 816 F.2d 695, 719-720 (1987) (Bork, J., dissenting).

Supreme Court, U.S.
MOTION FILED

JAN 12 2009

William K. Suter,
Clerk

Case No. 08-751

In the Supreme Court of the United States

COUNTY OF EL PASO, ET AL.,

Petitioners,

v.

MICHAEL CHERTOFF, SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY, AND
U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents.

On Petition for a Writ of Certiorari to the United States District Court for the Western District of Texas

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF AMICI CURIAE WILLIAM D. ARAIZA AND OTHER LAW PROFESSORS IN SUPPORT OF PETITIONERS

John A. Burlingame
SQUIRE, SANDERS & DEMPSEY L.L.P.
1201 Pennsylvania Avenue, N.W.
Suite 500
Washington, DC
(202) 626-6600

Pierre H. Bergeron*
Thomas D. Amrine
SQUIRE, SANDERS & DEMPSEY L.L.P.
221 E. Fourth Street,
Suite 2900
Cincinnati, OH 45202
(513) 361-1200

Counsel for Amici Curiae

*Counsel of Record

January 12, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION FOR LEAVE

Amici respectfully request leave to file the attached amicus brief in support of petitioners. *Amici* sought each party's consent to the filing of this brief. Because consent has not yet been received from respondents, *amici* submit this motion.

Amici are professors who study, teach, and publish on constitutional and administrative law. *Amici* share the view that Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note ("IIRIRA"), raises profound, unanswered questions concerning the elimination of any judicial review (except on constitutional questions) of an executive agency's delegated, wholly discretionary power to waive any statutes, whether federal, state, or local, that the agency sees fit in order to accomplish a given goal. Section 102(c) of IIRIRA precludes judicial review while granting unprecedented power to the Secretary of Homeland Security to waive any laws on the books, including laws that extend far beyond that agency's area of expertise and regulatory authority. This case, in a starker fashion than any before, raises the question of whether the "intelligible principle" requirement for an exceptionally broad delegation of one branch's powers can be satisfied in the absence of judicial review.

Many *amici* are practitioners who have litigated constitutional or administrative cases. All of the *amici* have published and lectured extensively on issues of constitutional or administrative law. *Amici* represent a wide range of experiences, backgrounds, and philosophical perspectives. But *amici* are unanimous in the view that the sweeping grant of waiver authority to the Homeland Security Secretary in Section 102(c) of the IIRIRA, when coupled with the preclusion of judicial review, raises significant questions that this Court should address about whether there has been an unconstitutional delegation of power and, more generally, whether the separation of powers doctrine has been violated.

For these reasons, *amici* request leave to file the attached amicus brief.

Respectfully submitted,

John A. Burlingame
SQUIRE, SANDERS & DEMPSEY L.L.P.
1201 Pennsylvania Avenue, N.W.
Suite 500
Washington, DC
(202) 626-6600

Pierre H. Bergeron*
Thomas D. Amrine
SQUIRE, SANDERS & DEMPSEY L.L.P.
221 E. Fourth Street,
Suite 2900
Cincinnati, OH 45202
(513) 361-1200
(513) 361-1201 (fax)
pbergeron@ssd.com

Counsel for Amici Curiae

January 12, 2009

*Counsel of Record

Case No. 08-751

In the Supreme Court of the United States

COUNTY OF EL PASO, ET AL.,

Petitioners,

v.

MICHAEL CHERTOFF, SECRETARY,
U.S. DEPARTMENT OF HOMELAND SECURITY, AND
U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents.

On Petition for a Writ of Certiorari to the United States District Court for the Western District of Texas

BRIEF OF AMICI CURIAE WILLIAM D. ARAIZA AND OTHER LAW PROFESSORS IN SUPPORT OF PETITIONERS

John A. Burlingame
SQUIRE, SANDERS & DEMPSEY L.L.P.
1201 Pennsylvania Avenue, N.W.
Suite 500
Washington, DC
(202) 626-6600

Pierre H. Bergeron*
Thomas D. Amrine
SQUIRE, SANDERS & DEMPSEY L.L.P.
221 E. Fourth Street,
Suite 2900
Cincinnati, OH 45202
(513) 361-1200

Counsel for Amici Curiae

*Counsel of Record

January 12, 2009

TABLE OF CONTENTS

PAGE

Table of Contents i

Table of Authorities ii

Statement 1

Interest of the *Amici* 1

Statement of the Case 3

Summary of Argument 7

Argument 10

I. A Writ of Certiorari Should Issue to Consider Whether Exceptionally Broad Delegations to Unelected Members of the Executive Branch Require the Availability of Judicial Review ... 10

II. Section 102(c) Raises Profound Questions Concerning the Power of Congress to Delegate Its Power to Nullify A Law 19

Conclusion 22

Appendix – List of *Amici*

TABLE OF AUTHORITIES

CASES PAGE

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 16

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 12

Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) 13, 15

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 13

City of Chicago v. Federal Power Comm'n, 458 F.2d 731, 742 (D.C. Cir. 1972) 15

Clinton v. City of New York, 524 U.S. 417 (1998) 10, 16, 20, 21

Department of Interior v. South Dakota, 519 U.S. 919 (1996) 17

Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir. 1976) 15

Heckler v. Chaney, 470 U.S. 821 (1985) 17

INS v. Chadha, 462 U.S. 919 (1983) .....*passim*

Marbury v. Madison, 5 U.S. 137 (1803) 12

Mistretta v. United States,
488 U.S. 361 (1989) 7, 11, 13

Nat'l Ass'n of Patients on Hemodialysis and Transplantation v. Heckler,
588 F. Supp. 1108, 1116-17 (D.D.C. 1984) 15, 18

Panama Canal Co. v. Grace Line, Inc.,
356 U.S. 309 (1958) 17

Panama Refining Co. v. Ryan,
293 U.S. 388 (1935) 17

Robertson v. Seattle Audubon Society,
503 U.S. 429 (1992) 19

Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (1999) 12

Skinner v. Mid-America Pipeline Co.,
490 U.S. 212 (1989) 7, 8, 11, 13, 17

Touby v. United States,
500 U.S. 160 (1991) 7, 10, 11, 13, 17

United States v. Bozarov,
974 F.2d 1037 (9th Cir. 1992) 18

United States v. Hovey,
674 F. Supp. 161 (D. Del. 1987) 18

United States v. Hammoud,
381 F.3d 316 (4th Cir. 2004) 18

United States v. Nourse,
34 U.S. 8 (1835) 12

United States v. Pastor,
557 F.2d 930 (2d Cir. 1977) 16

Yakus v. United States,
321 U.S. 414 (1944) 8, 11, 13, 17

CONSTITUTIONS, STATUTES, AND REGULATIONS

U.S. Const. art. I, § 1..... 19

Administrative Procedure Act,
5 U.S.C. § 551 .....*passim*

Illegal Immigration Reform and
Immigrant Responsibility Act of 1996,
Pub. L. No. 104-208, 110 Stat. 3009-554.....*passim*

National Environmental Policy Act of 1969,
42 U.S.C. § 4321 ..... 5, 6

Religious Freedom Restoration Act of 1993,
Pub. L. No. 103-141, 107 Stat. 1488 ..... 6, 9

70 Fed. Reg. 55,622 (Sept. 22, 2005) 5

72 Fed. Reg. 2,535 (Jan. 19, 2007)..... 5

72 Fed. Reg. 60,870 (Oct. 26, 2007) 5

73 Fed. Reg. 19,077 (April 8, 2008) 6

73 Fed. Reg. 19,078 (April 8, 2008) 6

MISCELLANEOUS

The Federalist No. 47 (James Madison) (Clinton Rossiter ed., 1961) 21

Daniel D. Rodriguez, *The Presumption of Reviewability: A Study In Canonical Construction and Its Consequences*, 45 Vand. L. Rev. 743 (1992) 13

Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653 (1985) 16

STATEMENT

William D. Araiza and the other professors of constitutional and administrative law listed herein respectfully submit this *amicus* brief in support of the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICI*

Amici are professors who study, teach, and publish on constitutional and administrative law. *Amici* share the view that Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note ("IIRIRA"), raises profound, unanswered questions concerning the elimination of any judicial review (except on constitutional questions) of an executive agency's delegated, wholly discretionary power to waive any statutes, whether federal, state, or local, that the agency sees fit in order to accomplish a given goal. Section 102(c) of IIRIRA precludes judicial review while granting unprecedented power to the Secretary of Homeland Security to waive any laws on the books, including laws that extend far beyond that agency's area of expertise and regulatory

---

[1] No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribution to its preparation. Counsel for each party received timely notice of *amici*'s intent to file this brief. Because consent has not yet been received from respondents, this brief is accompanied by a motion for leave.

authority. This case, in a starker fashion than any before, raises the question of whether the "intelligible principle" requirement for an exceptionally broad delegation of one branch's powers can be satisfied in the absence of judicial review. Given that the agency at this moment is wielding the waiver power conferred upon it by Section 102 without constraint, this case squarely presents the fundamental question of whether the Constitution allows Congress to grant unlimited, unfettered, and unreviewable power to an executive branch official to waive any law when he or she deems it "necessary" to accomplish a stated goal. For this reason, *amici* believe this case warrants the Court's review.

Many *amici* are practitioners who have litigated constitutional or administrative cases. All of the *amici* have published and lectured extensively on issues of constitutional or administrative law. *Amici* represent a wide range of experiences, backgrounds, and philosophical perspectives. But *amici* are unanimous in the view that the sweeping grant of waiver authority to the Homeland Security Secretary in Section 102(c) of the IIRIRA, when coupled with the preclusion of judicial review, raises significant questions that this Court should address about whether there has been an unconstitutional delegation of power and, more generally, whether the separation of powers doctrine has been violated.

Amici submit this brief in their individual capacities. A list of the *amici* is attached to this brief as the Appendix.

STATEMENT OF THE CASE

Section 102(c) of the IIRIRA directs the Secretary of Homeland Security to take such actions as may be necessary to install physical barriers and roads (including the removal of obstacles to the detection of illegal immigrants) in the vicinity of the United States border. To achieve this end, Section 102(c)(1) provides:

> (c)(1) Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

IIRIRA § 102(c)(1).

This delegation of authority to an executive agency to waive any law or legal requirement, whether federal, state or local, is unprecedented. Certainly a number of federal laws have authorized an agency official to waive legal requirements in particular circumstances. But such delegations have typically involved directions to the executive to waive particular provisions of laws. Moreover, such directions usually instruct or authorize the executive to waive only provisions of the same law containing

the waiver authority itself, and such waivers usually are subject to judicial review.

Here the delegation, while limited as to purpose, is unlimited as to application. The Secretary of Homeland Security, upon a mere pronouncement that he finds waiver "necessary," can waive any law promulgated by any authority in effect anywhere in the nation. As far as *amici* can determine, Congress has never delegated to a federal agency anything approaching such an omnibus waiver authority.

Moreover, prior delegations to an executive agency of the power to waive laws usually, if not always, have involved the waiver of laws within the purview of that agency's expertise and specialized knowledge. Section 102(c) of IIRIRA, by contrast, gives the Secretary of Homeland Security the authority to waive rules and regulations in every area of the law, far outside his department's specialized knowledge and expertise, and regardless of what those with specialized knowledge and expertise have concluded is necessary and appropriate when developing the rules and regulations waived. This delegation is uniquely suspect in that it allows the Secretary to waive selectively and without reason not only substantive but procedural statutes, such as the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the "APA").

The Secretary's exercise of the Section 102(c) waiver delegation has been as unfettered in practice as it is unlimited in authorization. On September 22, 2005, the Secretary invoked his authority under IIRIRA § 102(c) to waive "in their entirety," along a

14 mile stretch of the U.S. border with Mexico near San Diego, "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* ("NEPA"), the entirety of the APA, and six other environmental and historic preservation statutes. 70 Fed. Reg. 55,622 (Sept. 22, 2005). On January 19, 2007, the Secretary invoked his Section 102(c) authority to waive in Arizona's Barry M. Goldwater Range "all Federal, State or other laws, regulations and legal requirements of, deriving from, or related to the subject of" NEPA, the APA and eight other statutes. 72 Fed. Reg. 2,535 (January 19, 2007).

On October 26, 2007, the Secretary invoked his authority under Section 102(c) of IIRIRA to waive in the San Pedro Riparian National Conservation Area "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" NEPA, the Arizona-Idaho Conservation Act, and seventeen other laws, including the entirety of the APA. He asserted that the waiver of these laws was "necessary ... to ensure the expeditious construction of the barriers and roads," but he provided no explanation of the reasons for that determination. 72 Fed. Reg. 60,870 (Oct. 26, 2007).

On April 3, 2008, the Secretary issued a sweeping waiver covering 470 miles of the border from California to Texas. Invoking his authority under Section 102(c) of the IIRIRA, the Secretary waived "all federal, state, or other laws, regulations and

legal requirements of, deriving from, or related to the subject of" 30 laws, again including NEPA, other federal environmental laws, and the entirety of the APA.[2] Secretary Chertoff asserted that the waiver of these laws, in their entirety and across much of this nation's Mexican border, is "necessary ... to ensure the expeditious construction of the barriers and roads." The Secretary provided no explanation of why he found it "necessary" to waive all provisions of 30 statutes including, for instance, the Religious Freedom Restoration Act (42 U.S.C. § 2000bb) prohibiting the federal government from substantially burdening a person's exercise of religion. 73 Fed. Reg. 19,078 (April 8, 2008).

Also on April 3, 2008, the Secretary issued a waiver covering a 22 mile stretch in Hidalgo County, Texas. The Hidalgo County waiver is identical in scope to the Secretary's other April 3, 2008 waiver. 73 Fed. Reg. 19,077 (April 8, 2008).[3] These two waivers gave rise to the instant litigation.

To date, the Secretary has seen fit to waive laws protecting the environment, public health, freedom of religious exercise, and historic resources. But with no more than the unsupported assertion of "necessity" that he has invoked to waive those laws, the Secretary also may waive any other law he desires. He is equally free to waive the requirements of the Fair Labor Relations Act to halt a strike, or

---

[2] This waiver was corrected on April 8, 2008 to include geographical information on the project areas.

[3] This waiver, too, was corrected on April 8 to describe the project area.

the provisions of the Occupational Safety and Health Act ("OSHA") to force workers to endure unsafe working conditions, or the state speed limits in California, New Mexico, Arizona and Texas to race equipment and materials to construction sites. Section 102(c) gives the Secretary the power to waive treaties with Mexico governing the location of the border, management of the border zone, and movement of water, goods, and services across the border so long as he deems it, in his sole and unreviewable discretion, "necessary." Indeed, under Section 102(c) the Secretary could waive immigration laws and regulations, hire illegal aliens, subject them to workplace conditions prohibited by OSHA and pay them less than the minimum wage if he deems it necessary to build the fence.

It also bears noting that the Secretary has specifically waived all state and local laws relating to the subjects of the 30 federal laws named in his waivers. This includes all state and local laws dealing with the environment, water and riparian rights, historic preservation, Native American religious freedom and practices, and other subjects.

SUMMARY OF ARGUMENT

The assurance of judicial review has been at the heart of this Court's review of constitutional challenges to Congressional delegations of power. In particular, the availability of judicial review underlies this Court's "intelligible principle" jurisprudence. *See, e.g., Touby v. United States*, 500 U.S. 160, 168-69 (1991); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218-19 (1989); *Mistretta v. United*

States, 488 U.S. 361, 379 (1989); *INS v. Chadha*, 462 U.S. 919, 953 n. 16 (1983); *Yakus v. United States*, 321 U.S. 414, 426 (1944). However, this Court has never directly addressed the question of whether, in the case of an exceptionally broad delegation, satisfaction of the "intelligible principle" test requires the availability of judicial review. Put another way, can the "longstanding principle" that Congress may delegate powers to the executive branch "so long as Congress provides an administrative agency with standards guiding its actions *such that a court could ascertain* whether the will of Congress has been obeyed..." be satisfied if the "court" is entirely removed from the principle's operation? *See Skinner*, 490 U.S. at 218-19 (emphasis added; internal quotation marks omitted). The Court has never answered this question, which is of critical importance to ensuring that Congress's delegation of authority to executive branch agencies is done in a manner consistent with separation of powers.

Section 102 of the IIRIRA presents this Court with the most sweeping and starkest possible context to address this question, because Congress could scarcely have made a broader delegation than this one. Section 102(c)(1) of the IIRIRA grants the Secretary of Homeland Security, "[n]otwithstanding any other provision of law," the "authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." Pursuant to this authority, the Secretary already has issued five waivers nullifying 30 statutes and all rules, regulations, and

legal requirements deriving from or related to the subject matter of those statutes along much of the border with Mexico. Among other laws, almost every federal environmental and historic preservation statute has been waived, as have the Religious Freedom Restoration Act and the Administrative Procedure Act.

The Secretary has asserted that these sweeping waivers are "necessary" but, contrary to what normally might occur in the context of reviewable agency action, has offered no reasons why. None of these waivers can be reviewed by the courts except on constitutional grounds. IIRIRA § 102(c)(2)(A).[4] Neither this Court nor any court of appeals has ever been asked to review a delegation to suspend statutory requirements that is this far-reaching, nor has any court ever upheld as broad a delegation of legislative power to the executive branch in the absence of judicial review.

The Court should grant the writ of certiorari to address whether such a delegation can be made without judicial review. In addition, the Court may wish to take this opportunity to consider whether there are circumstances under which the Congressional delegation must be subjected to greater scrutiny, such as when a delegation is especially broad or when an agency is permitted to waive laws that are outside the scope of its expertise. The unrestricted grant of power to an unelected

---

[4] The statute also precludes any right of appeal to the courts of appeals following a determination of a constitutional question. IIRIRA § 102(c)(2)(C).

official to waive any law on the books when he deems it "necessary" for his purposes, including not only substantive laws but also procedural statutes, raises the specter of arbitrary power and the loss of liberty. "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). A writ of certiorari should issue.

ARGUMENT

I. A Writ of Certiorari Should Issue to Consider Whether Exceptionally Broad Delegations to Unelected Members of the Executive Branch Require the Availability of Judicial Review.

Section 102(c) of the IIRIRA forbids judicial challenges to Secretary Chertoff's waiver determinations. After vesting exclusive jurisdiction in the district courts, section 102(c)(2)(A) of the statute sharply limits that jurisdiction:

> A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

The Court has consistently highlighted the availability of judicial review of administrative action as an essential predicate to upholding broad delegations of congressional power under the "intelligible principle" requirement. *See, e.g., Touby,*

500 U.S. at 168-69; *Skinner*, 490 U.S. at 218-19; *Mistretta*, 488 U.S. at 379; *Yakus*, 321 U.S. at 436. The IIRIRA's prohibition of judicial review in the context of a grant of exceptionally broad authority presents a critical question warranting a grant of certiorari.

The Court has described as "longstanding" the principle that Congress can delegate powers to the executive branch "so long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed." *Skinner*, 490 U.S. at 218 (internal quotation marks omitted). The availability of judicial review ensures executive compliance with congressional will, and thereby ensures that the executive branch is limited to enforcing the law rather than making it. *Chadha*, 462 U.S. at 953 n.16.

The Court's non-delegation analyses reveal the importance of judicial review. In *Touby v. United States*, for example, the Court rejected the argument that the challenged statute was an unconstitutional delegation due to a purported lack of judicial review. Importantly, however, the Court did not deny the importance of judicial review to the constitutional question; rather it concluded that the statute did in fact provide for adequate judicial review. *See Touby*, 500 U.S. at 168-69. Concurring, Justice Marshall explained the reason for this longstanding concern with judicial review: "[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." *Id.* at 170 (Marshall, J., concurring).

In the modern era of broad delegations to administrative agencies, judicial review assures the continuing validity of Chief Justice Marshall's observation:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

United States v. Nourse, 34 U.S. 8, 28-29 (1835); *see also Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). Therefore, our "constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates...." *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 44 (1999) (Thomas, J., dissenting). This insight underlies the well-established presumption that agency action is subject to judicial review. *Abbott Laboratories v.*

Gardner, 387 U.S. 136, 140 (1967). [5] That presumption, and the reasons for it, underlie the non-delegation doctrine's concern for judicial review as expressed in cases such as *Touby*, *Skinner*, *Mistretta* and *Yakus*. As an influential lower court opinion explained, "Concepts of control and accountability define the constitutional requirement [of non-delegation]." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three-judge panel). [6]

The Court has recognized the importance of judicial review when distinguishing at the most basic level between legislative action reserved to Congress and policymaking that can appropriately

---

[5] When Congress intends to preclude judicial review, the Court has required Congress to do so with "specific language or specific legislative history that is a reliable indicator of congressional intent." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 673 (1986), *superseded by statute*, Omnibus Budget Reconciliation Act of 1986, 42 U.S.C. § 1395ff (1992). "[C]lear and convincing evidence" is required to overcome the "strong presumption that Congress did not mean to prohibit all judicial review." *Bowen*, 476 U.S. at 671-72.

[6] One scholar has connected judicial review of agency action and non-delegation as follows: "Framed as a sort of presumption, the notion was that [judicial] review was necessary to assuage concerns over the constitutionality of the New Deal regulatory statutes. Review was part of a constitutional quid pro quo: courts would decline to employ the nondelegation doctrine to overturn statutes and, in return, courts would preserve the power to review agency decisions." Daniel D. Rodriguez, *The Presumption of Reviewability: A Study In Canonical Construction and Its Consequences*, 45 Vand. L. Rev. 743, 755 (1992). This statement does not contemplate the situation present in this case, where a constitutionally troubling delegation comes unaccompanied by judicial review.

be delegated to administrative agencies. In *Chadha* the Court, distinguishing lawmaking (which requires adherence to bicameralism and presentment) from administrative action (which does not), relied on the limitations constraining administrative action, limitations that assumed the existence of judicial review:

> The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it – a statute duly enacted pursuant to Art. I, §§ 1, 7. The constitutionality of the Attorney General's execution of the authority delegated to him by [the Immigration and Nationality Act] involves only a question of delegation doctrine. The courts, when a case or controversy arises, can always "ascertain whether the will of Congress has been obeyed," *Yakus v. United States,* 321 U.S. 414, 425, 64 S.Ct. 660, 668, 88 L.Ed. 834 (1944), and can enforce adherence to statutory standards. *It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act.*

Chadha, 462 U.S at 953 n.16 (1983) (emphasis added; citations omitted).

Presaging *Chadha*, an influential lower court judge similarly noted that "Congress has been willing to delegate its legislative powers broadly – and courts have upheld such delegation – because there is court review to assure that the agency exercises the delegated power within statutory limits." *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 68 (D.C. Cir. 1976) (*en banc*) (Leventhal, J., concurring) (footnote omitted), *cert. denied*, 426 U.S. 941 (1976). By contrast, an excessively broad waiver provision that does not require the Secretary to provide reasons, and whose invocation is not subject to judicial review, prevents any assessment of congressional will or whether that will is being followed. The "control and accountability" that underlie "the constitutional requirement" of non-delegation, *Amalgated Meat Cutters*, 337 F. Supp. at 476, are thwarted when a denial of judicial review precludes enforcement of the legislative will. As one court concluded, were this linkage broken "the law governing delegation would also become little more than formalistic mutterings, for it makes little sense to require that the legislature articulate intelligible standards to govern agency action if realistic inquiry into whether those standards are being followed were foreclosed." *City of Chicago v. Federal Power Comm'n*, 458 F.2d 731, 742 (D.C. Cir. 1972). *See also, e.g., Nat'l Ass'n of Patients on Hemodialysis and Transplantation v. Heckler*, 588 F. Supp. 1108, 1116-17 (D.D.C. 1984) ("The complete absence of judicial oversight over an entire regulatory program would raise a serious constitutional issue concerning an improper delegation of legislative power to the Executive.").

Beyond ensuring basic fidelity to statutory commands that have complied with Article I, judicial review of agency action also helps guard against arbitrary use of discretion in implementing statutes. *See Clinton*, 524 U.S. at 489 (Breyer, J., dissenting); *United States v. Pastor*, 557 F.2d 930, 941 (2d Cir. 1977) ("The procedures prescribed by Congress for regulation of the [administrator's conduct], coupled with the availability of judicial review . . . assure that the delegatee will not act capriciously or arbitrarily. The delegation is therefore constitutionally valid."). When Congress delegates broad authority that could support a range of different agency decisions, and the legislative directive thus cannot provide fully sufficient guidelines, judicial review protects "the coherence and the integrity of the legislative process." Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 656 (1985). Indeed, even the mere availability of judicial review plays this salutary role, as "the prospect of review increases the likelihood of fidelity to substantive and procedural norms." *Id.* Judicial review of discretionary agency action is especially important given agencies' lack of direct electoral accountability. *Cf. Clinton*, 524 U.S. at 490 (Breyer, J., dissenting) (distinguishing on this basis between the importance of judicial review of presidential discretion and review of agency discretion).

For these reasons, it is hardly surprising that the absence of judicial review has been a significant consideration on the limited occasions when this Court has found that statutes violate the non-delegation principle. *A.L.A. Schechter Poultry Corp.*

v. United States, 295 U.S. 495, 533 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 432 (1935). Indeed, delegations without judicial review have only been upheld when they have not raised serious separation of powers issues. *See, e.g., Heckler v. Chaney*, 470 U.S. 821 (1985) (authority to the Food and Drug Administration to bring enforcement actions under the Food, Drug and Cosmetic Act where judicial review was appropriately precluded given the law-enforcement nature of the authority); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958) (authority to Panama Canal Company to set Panama Canal tolls where judicial review was appropriately declined given the lack of legal standards controlling the agency's action). By contrast, in cases raising non-delegation concerns the Court has taken pains to note both the existence of judicial review and, indeed, the adequacy of the particular judicial review provisions. *See, e.g., Touby*, 500 U.S. at 168-169.

The petition for certiorari raises important questions, so far unanswered by the Court, about the necessity of judicial review to the constitutionality of exceptionally broad delegations of congressional power. As described above, prior authority from this Court suggests the importance of judicial review as a predicate to the resolution of non-delegation claims. *See, e.g., Touby*, 500 U.S. at 168-69; *Skinner*, 490 U.S. at 218-19; *Chadha*, 462 U.S. at 953 n. 16; *Yakus*, 321 U.S. at 425. Yet members of the Court have raised questions about this principle. In *Department of Interior v. South Dakota*, 519 U.S. 919 (1996), this Court vacated and remanded without need for argument a judgment of the Eighth Circuit

after the Solicitor General had effectively conceded that the challenged agency action was subject to judicial review. However, the dissenting opinion appears to raise doubts about the necessity of judicial review to a valid delegation of legislative power. 519 U.S. at 921-22 (Scalia, J., dissenting). The uncertainty on this fundamental issue has been noted by the lower courts. *See, e.g., United States v. Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc) ("it is not clear whether the nondelegation doctrine requires any form of judicial review"), *vacated on other grounds*, 543 U.S. 1097 (2005); *compare also United States v. Bozarov*, 974 F.2d 1037, 1041-45 (9th Cir. 1992) (reversing district court's decision that the Export Administration Act violated the non-delegation doctrine because of the lack of a provision for judicial review), *cert. denied*, 507 U.S. 917 (1993), *with United States v. Hovey*, 674 F. Supp. 161, 164 & n.9 (D. Del. 1987) (citing cases that upheld Sections 811 and 812 of the Controlled Substances Act against a non-delegation challenge based in part on the availability of judicial review) *and Nat'l Ass'n of Patients on Hemodialysis*, 588 F. Supp. at 1116-17 ("The complete absence of judicial oversight over an entire regulatory program would raise a serious constitutional issue concerning an improper delegation of legislative power to the Executive.").

This case presents the question in the starkest possible way. Section 102(c) of the IIRIRA effects a nearly unprecedented delegation of authority to waive any "legal requirement[]" in the nation. That authority is unchecked by any judicial review of whether the administrative agency is making those

waivers in compliance with congressional will and in a reasoned fashion. The Secretary has employed this discretion aggressively and without real explanation. The characteristics of the challenged statute and its implementation make it an ideal vehicle to resolve the question of whether the grant of such broad waiver power to an unelected official, without judicial review of his use of that power, is constitutional.

II. Section 102(c) Raises Profound Questions Concerning the Power of Congress to Delegate Its Power to Nullify a Law.

Section 102(c) endows the Homeland Security Secretary with a core Article I power to amend statutes by limiting the extent of their force and effect. U.S. Const. art. I, § 1. The nullification of a statute is a quintessentially legislative function. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437-441 (1992). Congress has delegated this function to an agency on prior occasions, but such delegations have only authorized the agency to waive a legal provision upon the occurrence of specified events, or upon the making of specified determinations. Section 102(c) is unprecedented in the breadth of its waiver authority. Section 102(c) is not analogous to statutes that impose a rule of conduct but then authorize the agency to waive that rule under certain circumstances. Instead, Section 102(c)'s waiver authority is freewheeling, extending to any "legal requirement" in force. The breadth of Section 102(c)'s authority has already been remarked upon. What is significant here is the fact that this authority is not linked to the original grant of power – *i.e.*, the

original rules of conduct the agency is empowered to implement.

This decoupling raises the question of whether Section 102(c) is functionally indistinguishable from the line item veto that the Court struck down in *Clinton v. City of New York*. The *Clinton* Court was rightly concerned that what emerged from the President's exercise of his powers under the Line Item Veto Act – "truncated versions of two bills that passed both Houses of Congress" – were "not the product of the 'finely wrought' procedure that the Framers designed." *Clinton*, 524 U.S. at 440. So too the waivers resulting from the Secretary's exercise of his Section 102(c) powers modify statutes in disregard of the "single, finely wrought and exhaustively considered, procedure" set forth in the Constitution. *Chadha*, 462 U.S. at 951. If that constitutional procedure does not contemplate the President performing the functional equivalent of partially repealing statutes, it surely does not contemplate such conduct by an unelected executive branch officer. The repeal, even partial, of a legislative enactment is itself a uniquely legislative act. *Chadha*, 462 U.S. at 954 (repeal of statutes, no less than enactment, must conform with Art. I).

It is no answer to contend that the Secretary's repeal power is only partial. For the geographic areas, the circumstances, and the time frames decided upon by the Secretary, the target laws are a nullity.

At a minimum, Section 102(c) raises the question of whether the legislative authority to repeal or

modify any legal requirement of any and every sort can be delegated to an unelected executive branch official. The Secretary's actions to date pursuant to Section 102(c) directly frame this question for the Court. This case presents the Court with the opportunity to delineate whether such a delegation can ever be constitutional and, if so, to demarcate its outer constitutional bounds.

"[L]iberty demands limits on the ability of any one branch to influence basic political decisions." *Clinton*, 524 U.S. at 450-51 (Kennedy, J., concurring). Quoting Montesquieu, the Federalist made the point as follows:

> "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner."

The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961), *quoted in Clinton*, 524 U.S. at 451 (Kennedy, J., concurring). A writ of certiorari should issue to determine whether Section 102(c) violates the principles of separation of powers by unconstitutionally delegating legislative power to the Secretary of Homeland Security.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

John A. Burlingame
SQUIRE, SANDERS & DEMPSEY L.L.P.
1201 Pennsylvania Avenue, N.W.
Suite 500
Washington, DC
(202) 626-6600

Pierre H. Bergeron*
Thomas D. Amrine
SQUIRE, SANDERS & DEMPSEY L.L.P.
221 E. Fourth Street,
Suite 2900
Cincinnati, OH 45202
(513) 361-1200
(513) 361-1201 (fax)
pbergeron@ssd.com

Counsel for Amici Curiae

January 12, 2009

*Counsel of Record

APPENDIX

APPENDIX

William D. Araiza, Professor of Law,
Brooklyn Law School, Brooklyn, NY

Sande Buhai, Professor of Law,
Loyola Law School Los Angeles, Los Angeles, CA

Bryan Camp, George H. Mahon Professor of Law,
Texas Tech University School of Law, Lubbock, TX

Michael Dorf, Robert S. Stevens Professor of Law,
Cornell Law School, Ithaca, NY

Cynthia Farina, Professor of Law,
Cornell Law School, Ithaca, NY

Thomas Field, Professor of Law,
Franklin Pierce Law Center, Concord, MA

Linda Jellum, Associate Professor,
Mercer University Walter F. George School of Law,
Macon, GA

Steve Johnson, Associate Dean for Academic Affairs,
Mercer University Walter F. George School of Law,
Macon, GA

William S. Jordan, III, Professor of Law,
University of Akron School of Law, Akron, OH

Calvin R. Massey, Professor of Law,
University of California Hastings College of the Law,
San Francisco, CA

John T. McDermott, Professor of Law,
Loyola Law School Los Angeles, Los Angeles, CA

Gillian Metzger, Professor of Law,
Columbia Law School, New York, NY

Eric J. Mitnick, Associate Dean for Academic Affairs
and Professor of Law,
Thomas Jefferson School of Law, San Diego, CA

Morell E. Mullins, Professor of Law Emeritus,
University of Arkansas at Little Rock,
William H. Bowen School of Law, Little, AK

Jim Rossi, Harry M. Walborsky Professor and
Associate Dean for Research,
Florida State University College of Law,
Tallahassee, Florida

Peter M. Shane, Jacob E. Davis and Jacob E. Davis
II Chair in Law,
Michael E. Moritz College of Law at The Ohio State
University,
Columbus, OH

Peter L. Strauss, Betts Professor of Law,
Columbia Law School, New York, NY

Georgene Vairo, Professor of Law and William M.
Rains Fellow,
Loyola Law School Los Angeles, Los Angeles, CA

Christina E. Wells, Enoch H. Crowder Professor of Law,
University of Missouri School of Law, Columbia, MO